

(25,049)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 322.

J. HARRY HULL, AS TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF FRANCIS J. PALMER, BANKRUPT, PLAINTIFF IN ERROR,

vs.

THE FARMERS' LOAN & TRUST COMPANY AND FRANCIS
J. PALMER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals of the State of New York.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff-Appellant,
against

FRANCIS J. PALMER, SARA H. PALMER, HARRIET M. PALMER, and
the Farmers' Loan and Trust Company, Defendants; Francis J.
Palmer and the Farmers' Loan and Trust Company, Defendants-
Respondents.

PAPERS ON APPEAL.

Gallert & Heilborn, Attorneys for Plaintiff-Appellant, 31 Liberty Street, New York City.

Geller, Rolston & Horan, Attorneys for Defendant-Respondent, the Farmers' Loan and Trust Co., 22 Exchange Place, New York City.

Howe, Smith & Howe, Attorneys for Defendant-Respondent, Francis J. Palmer, 2 Rector Street, New York City.

b COURT OF APPEALS, STATE OF NEW YORK:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 5th day of January, in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

Witness, the Hon. Willard Bartlett, Chief Judge, presiding.
R. M. BARBER, Clerk.

Remittitur Jan'y 6th, 1915.

J. HARRY HULL, as Trustee, &c., Appellant,
ag'st
FRANCIS J. PALMER and THE FARMERS' LOAN AND TRUST CO.,
Impl'd with Others, Respondents.

Be it remembered, That on the 16th day of March, in the year of our Lord one thousand nine hundred and fourteen, J. Harry Hull, as Trustee &c. the appellant in this action, came here into the Court of Appeals, by Gallert & Heilborn, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Francis J. Palmer and ano., respondents in said action, afterwards appeared in said Court of Appeals by Howe, Smith & Howe, and Geller, Rolston & Horan, their attorneys.

Which said notice of appeal and return thereto filed as aforesaid,
are hereunto annexed.

c Whereupon, the said Court of Appeals having heard this cause argued by Mr. Walter S. Heilborn, of counsel for the appellant, and by Mr. Gerritt Smith and Mr. Frederick Geller, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondents recover against the appellant the costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals, aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, January 6th, 1915.

d I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

1

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

Statement under Rule 41.

This action was commenced by the service of a summons and complaint on the defendant, The Farmers' Loan and Trust Company, on the 8th day of January, 1912. Howe, Smith & Howe,

appeared for the defendant, Francis J. Palmer, on the 13th day of January, 1912, and accepted service of the summons and complaint.

The defendant, The Farmers' Loan and Trust Company served a demurrer to the complaint on the 27th day of January, 1912, and the defendant, Francis J. Palmer, served a demurrer to the complaint on the 1st day of February, 1912.

The above are the names in full of the original parties to the action.

2 The plaintiff appears by Gallert & Heilborn.

The defendant, The Farmers' Loan and Trust Company, appeared by Geller, Rolston & Horan, and the defendant, Francis J. Palmer, by Howe, Smith & Howe, and there has been no change of parties or attorneys since the commencement of this action.

Notice of Appeal.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

SIRS: Please take notice that the above named plaintiff hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, from the decision

herein dated the 11th day of June, 1912, and entered and
3 filed in the office of the Clerk of the County of New York,

on the 11th day of June, 1912, and from the judgment entered herein on the 25th day of June, 1912, sustaining the demurrer of the defendants, Francis J. Palmer and The Farmers' Loan and Trust Company, herein to the complaint of the plaintiff and dismissing the complaint of the plaintiff herein, and for \$47.79 costs, and from the whole and each and every part of said decision and judgment.

Dated, New York, June 28th, 1912.

Yours, etc.,

GALLERT & HEILBORN,
Attorneys for Plaintiff.

O. & P. O. Address, 31 Liberty Street, Manhattan, New York.

To Howe, Smith & Howe, Esqs., Att'y's for Def't Francis J. Palmer, 2 Rector Street, Manhattan, New York.

Geller, Rolston & Horan, Esqs., Att'y's for Farmers' Loan & Trust Company, 22 Exchange Place, New York, N. Y.

William F. Schneider, Esq., Clerk of the County of New York, Manhattan, N. Y.

Summons.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

To the above named Defendants and each of them:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, January 5th, 1912.

GALLERT & HEILBORN,
Plaintiff's Attorneys.

Office and Post Office Address, No. 31 Liberty Street, Manhattan, New York.

Complaint.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

The complaint of the plaintiff above named, by Gillert & Heilborn, his attorneys, respectfully shows to the Court and alleges:

I. That on or about the 22nd day of July, 1907, the defendant, Francis J. Palmer, filed in the office of the Clerk of the United States District Court in and for the Southern District of New York, a voluntary petition in bankruptcy, together with a schedule of assets and liabilities required by law to be filed therewith and was on said 22nd day of July, 1907, duly adjudicated a bankrupt.

II. That on or about the 6th day of September, 1907, the Hon. William Allen, one of the referees in bankruptcy of the United States District Court in and for the Southern District of New York, and the referee to whom said bankruptcy proceedings had been duly referred by said Court, upon the unanimous request and suggestion of the creditors of said bankrupt duly appointed J. Harry Hull, the plaintiff herein, Trustee of the estate of said Francis J. Palmer, bankrupt, and fixed the amount

of his bond at one hundred dollars and thereafter and on or about the 11th day of September, 1907, the said trustee duly qualified by duly filing and having duly approved by said United States District Court in and for the Southern District of New York, a bond in said amount and thereafter on the 8th day of November, 1907, said trustee presented his final report and was thereafter discharged of his trust.

IIa. The defendant, The Farmers' Loan and Trust Company, is a domestic banking corporation duly organized, created and existing under and by virtue of the Laws of the State of New York.

III. On information and belief, that on or about the 11th day of March, 1907, one Charles Palmer died at the City of New York, being at the time a citizen and resident of the said State of New York, leaving him surviving the defendant, Francis J. Palmer, and leaving a last will and testament bearing date May 4th, 1903, in the words and figures following, to wit:

"Be it Remembered, That I, Charles Palmer, of the Borough of Brooklyn, City of New York, County of Kings and State of New York, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament in manner following, that is to say:

7 First. I direct that all my just debts and funeral expenses be paid as soon as possible after my decease.

Second. I hereby give, devise and bequeath unto my wife, Harriette M. Palmer, all that certain dwelling house and lot of land upon which the same stands, known as Number 216 Carlton Avenue in said Borough of Brooklyn, City of New York and all the furniture, useful and ornamental, remaining therein at the time of my death belonging to me, together with all books, pictures, carpets, curtains, linen, china, silver and plated ware and all other household articles of every sort and description. To have and to hold the same during the term of her natural life; and upon the death of my said wife, I give and devise said house and furniture and other personal property above mentioned to my daughter Rosalie H. Coleman, to have and to hold the same during her natural life, and upon the death of the survivor of my said wife and daughter I give and devise the same to the children of my daughter, Leighton P. Coleman and Louis M. Coleman, absolutely forever, share and share alike; provided however that if either of said children shall be then dead the issue of said child then living shall take in equal share per stirpes the share of my said grandchild would have taken if living; and in default of such issue of either of my said grandchildren the other grandchild or its surviving issue shall take the whole of said property. I hereby expressly direct that neither my said wife nor daughter shall be required to give any bond as a condition of having said personal property turned over to her.

8 Third. I direct my executor to pay as soon as conveniently may be after my decease, to my grandson, Leighton P. Coleman, the sum of one thousand dollars; to my granddaughter, Louise M. Coleman, the sum of One thousand dollars: to my nephew, Henry Palmer, now living in Quakertown, Bucks County, Penn-

sylvania, the sum of Five hundred dollars; to my nephew, Charles Palmer, now living in Philadelphia, Pennsylvania, at 2264 Lembert Street, the sum of Five hundred dollars; to my niece, Sarah H. Snyder, now living in Richland Centre, Bucks County, Pennsylvania, the sum of Five hundred dollars; the last three mentioned being children of my late brother, Edward Palmer.

Fourth. I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers' Loan and Trust Company, the sum of Fifty thousand dollars, to be held by said The Farmers' Loan and Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, per stirpes, and in default of such issue to pay the income from said fund quarterly to my said daughter Rosalie H. Coleman during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to divide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living in equal shares per stirpes, to their own use, absolutely and forever.

Fifth. All the rest, residue and remainder of my estate, wheresoever situate and of whatever sort or nature, I give, devise and bequeath to the said The Farmers' Loan and Trust Company, as trustee and direct that the same shall be divided into two equal parts:

10 (1) One of said half parts of my estate I direct my said trustees to invest and from time to time to reinvest in interest or dividend-bearing securities as to it may seem proper, and to keep the same invested and to pay the net income therefrom

quarterly to my wife Harriette M. Palmer for and during the term of her natural life; and at her death to pay the said net income to her daughter, the said Rosalie H. Coleman, quarterly during her natural life; and upon the death of the survivor of my said wife and daughter to pay said principal sum to my grandchildren, Leighton P. Coleman and Louise M. Coleman, share and share alike, provided, however, that if either of said grandchildren shall have died before the death of the survivor of my said wife and daughter, the issue of said grandchild living at the death of said survivor shall take in equal shares per stirpes, the share my said grandchild would have taken if living; and in default of issue of either of my said grand children then living the other grandchild or its issue shall take the whole of said one-half.

(2) The other of said half parts of my said residuary estate I direct my said trustee to invest and from time to time to reinvest in interest or dividend-bearing securities as it may seem proper, and to keep the same invested and to pay the net income therefrom quarterly to my daughter Rosalie H. Coleman for and during the term of her natural life; and upon her death to pay the said principal sum to my grandchildren Leighton P. Coleman and Louise M. Coleman, share and share alike, provided, however, that if either of said grandchildren shall have died before their said
11 mother, the issue of said grandchild living at the death of my said daughter shall take in equal shares per stirpes, the share my said grandchild would have taken if living; and in default of such issue, of either of my said grandchildren the other grandchild or its issue then surviving shall take the whole of said one-half.

Sixth. I do hereby nominate, constitute and appoint The Farmers' Loan and Trust Company, a corporation having its office in the Borough of Manhattan, City of New York, to be the executor of this my last will and testament. I hereby authorize and empower my said executor, in the event that I shall at the time of my death be seized of or entitled to any real property, other than the house and lot mentioned in paragraph Second of this will, to grant, bargain and sell such other real property upon such terms and conditions as to it may seem proper, and to make, execute and deliver good and sufficient deeds of conveyance therefor, and to treat the proceeds of said real estate as though it were personal property in my hands at the time of my death.

Seventh. I do hereby revoke all other and former wills heretofore made by me.

In Testimony Whereof, I have hereunto set my hand and seal this fourth day of May, in the year one thousand nine hundred and three.

CHLS. PALMER. [SEAL.]

The foregoing instrument was on this 4th day of May, 1903,
signed, sealed, published and declared by the above named testator
as and for his last will and testament in the presence of us,
12 who, at his request in his presence and in the presence of each other, have hereunto subscribed our names as witnesses,

this attestation clause having first been read aloud. On fourth line from bottom of page the word 'other' substituted for 'surviving' before execution.

Frederick Geller, Bronxville, N. Y.

Roy R. Carpenter, 118 E. 28th St., New York City."

IV. That thereafter a proceeding was duly instituted in the Surrogate's Court in the County of Kings, City and State of New York, a Court of competent jurisdiction for the purpose of admitting to probate the said last will and testament of said Charles Palmer and such proceedings were thereupon duly had and taken, that on or about the 9th day of April, 1907, said last will and testament of the said Charles Palmer was duly admitted to probate by a decree duly made and entered by the said Surrogate's Court of the County of Kings as a will of real and personal property and letters testamentary thereon were duly issued by said Court on the 9th day of April, 1907, to the Farmers' Loan and Trust Company, a corporation having its offices in the Borough of Manhattan, to be the executor and trustee named in said last will and testament, and said trustee duly qualified as such and accepted the trust contained in said last will and testament and more especially the trust set forth and contained in the Fourth paragraph thereof, and said Farmers' Loan and Trust Company received, as trustees, as aforesaid, the principal sum of Fifty thousand dollars to be held by it under the provisions of the paragraph of said will marked

Fourth.

13 V. That the interest of the said Francis J. Palmer in and his title to the principal of said trust fund vested by operation of law in said trustee in bankruptcy as of the date said Francis J. Palmer was adjudged a bankrupt and the interest of said Francis J. Palmer in the principal of said trust fund was property which prior to the filing of the petition in bankruptcy said Francis J. Palmer could have transferred and which might have been levied upon and sold under judicial process against said Francis J. Palmer.

VI. That thereafter and on the 7th day of May, 1908, said Francis J. Palmer was duly discharged of all his debts.

VII. That on information and belief, thereafter proceedings were had in the Surrogate's Court in the County of Kings, a Court of competent jurisdiction, in a proceeding for the judicial settlement of the account of The Farmers' Loan and Trust Company as executor under the last will and testament of said Charles Palmer, deceased, to which said Farmers' Loan and Trust Company and said Francis J. Palmer were parties, wherein it was determined by said Court that the interest of the defendant, Francis J. Palmer in and to the principal of said trust fund had by his discharge in bankruptcy become a vested interest and that the trust created by the 4th paragraph of the last will and testament of said Charles Palmer was thereby terminated, and that the condition in said will of said Charles Palmer contained was thereby fulfilled and said trust of said Fifty thousand dollars determined.

14 VIII. On information and belief, the said Farmers' Loan and Trust Company, as Trustee, as aforesaid, had on May 7th, 1908, and thereafter, as the principal of said trust fund

cash and personal property in excess of \$48,500 and on or about the 24th day of August, 1910, paid to the defendant, Francis J. Palmer the sum of \$28,649.18 in cash and delivered ten one thousand dollar bonds of the Canadian Southern Railway Company and ten one thousand dollar bonds of the Union Pacific Railway Company and said cash and said bonds were at all times and still are the property of the bankrupt estate herein and the trustee in bankruptcy herein was at all times entitled to said moneys and to said bonds and to all the principal of said trust estate.

IX. On May 3rd, 1911, the District Court of the United States for the Southern District of New York ordered that the Estate of said Francis J. Palmer, the defendant herein should be reopened for the purpose of administering upon the principal of the trust created for the benefit of said defendant, Francis J. Palmer under the last will and testament of Charles Palmer as a part of the estate in bankruptcy of the defendant, Francis J. Palmer, and re-referred to William Allen, one of the referees in bankruptcy, the administration of said estate.

X. On or about the 19th day of May, 1911, the said William Allen, upon the unanimous request and suggestion of the creditors of said bankrupt, duly appointed J. Harry Hull, trustee of the estate of said Francis J. Palmer and fixed the amount of his bond at one hundred dollars, and thereafter and on or about the 20th day of

May, 1911, the said trustee duly qualified by duly filing and
15 having duly approved by said United States District Court in
and for the Southern District of New York a bond in said
amount and the plaintiff herein was continuously thereafter and still
is the trustee in bankruptcy of the estate of said Francis J. Palmer.

XI. On information and belief, the said Francis J. Palmer has in his custody and in his control in escrow a portion of the principal of said trust estate so delivered to him by said Farmers' Loan and Trust Company and has invested a portion thereof in the shares of stock of the Development Realty Company and otherwise and has proceeds of said trust fund in his possession and control.

XII. On information and belief, after May 3rd, 1911, the said defendant, Francis J. Palmer delivered without consideration and receiving no value therefor, and in fraud of the creditors of said defendant, Francis J. Palmer, whose claims were duly proved and allowed in said bankruptcy proceedings and in fraud of this plaintiff, in kind, to the defendant, Harriet M. Palmer, a portion of the principal of said trust estate to wit: fifteen of said bonds received by him as aforesaid, and delivered in addition to said defendant, Harriet M. Palmer, voluntarily and without receiving any consideration therefor, and in fraud of the creditors of said Francis J. Palmer whose claims were duly proved and allowed in said bankruptcy proceedings and of this plaintiff, property in large amount purchased by said Francis J. Palmer with the principal of said trust estate, to
16 wit: shares of capital stock of the Development Realty Company exceeding in value the sum of Ten thousand (\$10,000.00) dollars.

XIII. On information and belief, after the 24th day of August,

1910, the said defendant, Francis J. Palmer delivered, to the defendant, Sara Palmer in kind, voluntarily and without receiving any consideration therefor, and in fraud of the creditors of the said Francis J. Palmer whose claims were duly proved and allowed in said bankruptcy proceedings and of this plaintiff, a large portion of the principal of the said trust estate in value exceeding \$7,500 and delivered to said Sara J. Palmer, voluntarily and without receiving any consideration therefor, and in fraud of the creditors of said Francis J. Palmer whose claims were duly proved and allowed in said bankruptcy proceedings and of this plaintiff, investments made by said Francis J. Palmer purchased with a portion of the principal of said trust estate exceeding in value the sum of Twenty-five hundred (\$2,500.00) dollars.

XIV. The plaintiff herein is entitled to have a trust for his benefit impressed upon and to receive from said Francis J. Palmer and said Harriet M. Palmer and said Sara Palmer in kind, any and all balance of the principal of said trust fund now owned in kind by said defendants and each of them and is entitled to have sold any investments of the proceeds of any of said trust funds now in the possession and in the control of the said defendants and the proceeds of the said sale to receive on account of the obligations of said Farmers' Loan & Trust Company to him.

XV. On information and belief, claims have been filed
17 and duly allowed against the Estate of said Bankrupt in sums exceeding \$23,000 and said claims together with the interest thereon, together with the costs, disbursements and allowances in the administration of the said Estate will exceed the sum of \$48,000.

XVI. The Trustee has in his hands no assets and the only assets of said Estate are the principal of said trust fund.

XVII. Plaintiff has demanded that the said Farmers' Loan and Trust Company pay over to him an amount equal to the trust fund received by it under the Fourth Clause of the will of Charles M. Palmer for the benefit of Francis J. Palmer, and that said Farmers' Loan and Trust Company proceed to recover from Francis J. Palmer, the principal, if any, of said trust fund which it has improperly paid to said Francis J. Palmer since May 7th, 1908, and any accrued interest thereon, and that after recovery thereof the said Farmers' Loan and Trust Company pay the same to plaintiff, but the said defendant, The Farmers' Loan and Trust Company has neglected to proceed to recover said trust fund or to make any payment to the plaintiff herein.

Wherefore the plaintiff demands judgment:

1. That the defendants, Francis J. Palmer, Harriet M. Palmer and Sara J. Palmer and each of them be ordered to deliver, transfer, convey, assign and set over unto the plaintiff herein any and all balances of the principal of said trust fund now possessed in
18 kind by said defendants and each of them, and any income thereof received by them and each of them.

2. That the defendants, Francis J. Palmer, Harriet M. Palmer and Sara Palmer and each of them be directed to come into Court and make discovery concerning the nature and value of the proceeds

of the property purchased by them and each of them with the principal of said trust fund or with the proceeds thereof and any income thereof received by them and each of them.

3. That said property purchased by said Francis J. Palmer, Harriet M. Palmer and Sara Palmer with the principal of said trust fund or with the proceeds thereof be sold at public auction upon such notice as the Court may direct and by or under the direction of a Receiver or Referee or in such other manner as the Court may direct, and that such Receiver or other appointee of this Court be directed to convey to the purchaser thereof full and complete title thereto and pay to the plaintiff herein the net proceeds received thereof less his legal fees and disbursements.

4. That the plaintiff have judgment against the defendant, The Farmers' Loan and Trust Company for the difference between the value of said trust fund and the income which has accrued thereof since August 24th, 1910, and the value of the principal of the trust fund and the income thereof turned over to the plaintiff herein by said Francis J. Palmer, Harriet M. Palmer and Sara Palmer, and each of them, and the amount of cash received by the plaintiff herein pursuant to paragraph 3 hereof.

5. That the defendants, Francis J. Palmer, Sara Palmer
19 and Harriet M. Palmer be restrained, pending the determination of this action from in anywise transferring, assigning, delivering, setting over or otherwise conveying, mortgaging, pledging or otherwise incumbering any portion of the principal of said trust fund now in the possession or control of them or any of them, or with the proceeds of said principal of said trust fund now in the possession of them or any of them, and that the plaintiff have such other and further relief as may seem just, together with the costs and disbursements of this action, and in the alternative, in case the defendant, Francis J. Palmer and the defendant Sara Palmer and the defendant Harriet M. Palmer are unable to turn over and to deliver to the plaintiff herein the principal of said trust fund and the proceeds thereof, that the plaintiff have judgment against the defendants and each of them for the amount of the principal of said trust fund for which said defendants do not deliver to the plaintiff herein, or do not account for to the plaintiff herein and for such other and further relief as to this Court may seem proper, together with the costs and disbursements of this action.

GALLERT & HEILBORN,
Attorneys for Plaintiff.

Office & P. O. Address, 31 Liberty Street, Manhattan, New York.

20 STATE OF NEW YORK,

City of New York, County of New York, ss:

J. Harry Hull, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge

except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

J. HARRY HULL.

Sworn to before me, this 5th day of January, 1912.

HENRY A. EHERHARDT,
Notary Public, N. Y. Co.

21

Demurrer of Defendant Francis J. Palmer.

New York Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

The defendant, Francis J. Palmer, demurs to the complaint of the plaintiff herein on the following grounds which appear in the said complaint, on the face thereof:

I. That the plaintiff, as trustee in bankruptcy of the estate of Francis J. Palmer, has no legal capacity to sue for the fund involved in this action, for the reason that no right, title or interest in or to said fund ever vested in him.

II. That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, the defendant, Francis J. Palmer, demands
22 judgment that the complaint of the plaintiff be dismissed with costs to the defendant.

HOWE, SMITH & HOWE,
Attorneys for Defendant, Francis J. Palmer.

Office and P. O. Address, No. 2 Rector Street, New York City.

Demurrer of Defendant Farmers' Loan and Trust Company.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

The defendant, The Farmers' Loan and Trust Company, demurs to the complaint of the plaintiff herein on the following grounds, to wit:

1. That it appears upon the face thereof that the plaintiff has not

legal capacity to sue in that no right, title or interest in or to the fund involved in this action ever vested in him.

2. That it appears upon the face thereof that the complaint
23 does not state facts sufficient to constitute a cause of action.
Dated, January 27th, 1912.

GELLER, ROLSTON & HORAN,
'Attorneys for Defendant,
The Farmers' Loan and Trust Company.

Office and Post Office Address, No. 22 Exchange Place, Borough of Manhattan, City of New York.

Decision.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Plaintiff,

against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

The defendants Francis J. Palmer and The Farmers' Loan and Trust Company having demurred to the complaint herein on the grounds that it appears upon the face of said complaint that
24 the plaintiff has no legal capacity to sue in that no right, title or interest in or to the fund involved in this action ever vested in him, and that it appears upon the face of said complaint that the complaint does not state facts sufficient to constitute a cause of action; and said demurrer having come duly on to be heard before the court at a Special Term held by the undersigned at Part III of the Supreme Court held in and for the County of New York.

Now, after hearing Joseph P. Howe, Esq., of counsel for said defendant Francis J. Palmer, and Edward H. Blane, Esq., of counsel for said defendant The Farmers' Loan and Trust Company, in support of said demurrer, and Walter S. Heilborn, Esq., of counsel for the plaintiff, in opposition thereto, and due deliberation being had thereon, I do find and decide that the defendants Francis J. Palmer and The Farmers' Loan and Trust Company are entitled to a judgment sustaining the demurrer and dismissing the complaint with costs, and I do hereby direct that judgment be entered accordingly.

Dated, June 11th, 1912.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

25

Judgment.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

This cause having been regularly brought on for trial upon the issues of law formed by plaintiff's complaint and the demurrers of the defendants Francis J. Palmer and the Farmers' Loan and Trust Company, by Geller, Rolston and Horan, attorneys, at a Special Term held by the Honorable Samuel Greenbaum, one of the justices of this court, at Part III, Special Term thereof, who having heard the parties by their counsel and after due deliberation has duly made and filed his decision in writing, dated June 11th, 1912, directing that judgment sustaining said demurrers with costs be entered and said costs having been duly taxed at forty-seven 95/100 (\$47.95)

Dollars;

26 Now, on motion of Howe, Smith & Howe, Attorneys for the above named defendant Francis J. Palmer, it is

Adjudged and Decreed that the demurrers of the above named defendants Francis J. Palmer and the Farmers' Loan and Trust Company herein to the complaint of the plaintiff, be and hereby are sustained, and that the complaint in this action be and it hereby is dismissed with costs to the defendants against the plaintiff in the sum of Forty-seven and 95/100 (\$47.95) Dollars.

WM. F. SCHNEIDER, Clerk

27

Opinion of Mr. Justice Greenbaum.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN AND TRUST COMPANY, Defendants.

To my mind *National Park Bank v. Billings* (144 App. Div., 536, aff'd, 203 N. Y., 556) is inapplicable to the state of facts here present. In that case the defendant Billings "acquired upon the death of his father not a bare possibility merely" but the right to the possession and enjoyment of one-half of his father's estate in the event that he should attain the age of 25 years and survive his mother. The Court held that this was a future contingent interest in personal property which was alienable. From the facts alleged

in the complaint in this case it is clear that under the will of his father, Charles Palmer, the defendant Francis J. Palmer had merely a conditional interest in the principal of the trust therein
28 created. It was the clearly expressed intention of the testator that no interest in the principal of the fund should attach thereto in favor of Francis J. Palmer so long as he was insolvent, and that no portion of the trust fund was to be applicable to the payment of any of his debts while insolvent. In the event of the death of Francis J. Palmer before the termination of the trust as provided by the will of the principal was payable to his lawful issue, and in default of such issue the income was payable to the testator's daughter during the term of her natural life, and upon the death of the survivor of his said son and daughter (there being no issue of the son him surviving) the principal was to be divided among the issue of his daughter. The will also provides for the payment of the income to the son during his natural life. Under these testamentary provisions Francis J. Palmer when adjudicated a bankrupt, the time when the plaintiff's title, if any, to the trust fund in question arose, had no interest, legal or equitable, in the principal of the fund. The situation is quite analogous to that found in *Kenyon v. See* (94 N. Y., 563, 567). There a testator bequeathed in trust a third of his entire estate to pay the interest thereof to his grandson, Seymour Hobart Spencer semi-annually "upon the express condition that the said Seymour Hobart Spencer shall renounce the Roman Catholic priesthood * * * and upon the further condition that said Seymour Hobart Spencer shall marry, I give, devise and bequeath the said money held in trust, together with the accumulated interest thereon, to my said grandson." The court held that Seymour H. Spencer "was entitled to the income only upon and from his renunciation of the Roman Catholic priesthood and to the
29 principal only upon his marriage. The conditions were precedent, and until performance he took no interest, legal or equitable, in the fund." The same rule was recognized in *Booth v. Baptist Church et al.* (126 N. Y., 215, 241, 242). In that case a bequest of \$10,000 to the Baptist Church of Poughkeepsie was conditional upon the church raising a sum sufficient with said legacy to pay off the existing mortgage and other debts of said church within two years of the death of the testator; the court held that the condition was a precedent one; that there was no gift until the condition was fulfilled, and that the fund was to be treated as belonging to the estate and subject to the absolute disposition of the testator if the condition is not performed. It seems clear that Francis J. Palmer had no future contingent interest in the principal of the trust fund, but merely an interest which was a conditional bequest. *National Park Bank v. Billings* (*supra*) at page 541 holds that it was by reason of the statutes that contingent remainders in real property are now alienable, and that by assimilating the rules applicable to real property that the future interests in personal property are also alienable. The same case recognizes that "at common law contingent interests were not alienable or assignable to strangers" (p. 542); hence it follows that in the absence of a statute conferring

the power to alien conditional gifts such interests are not alienable and the trustee in bankruptey never acquired any interest in the trust fund. In the case at bar the accomplishment of a state of financial solvency on the part of Francis J. Palmer without
 30 recourse to the trust fund was a condition precedent to his acquisition of any interest in the principal of the fund, and at the time of his adjudication as a bankrupt he had not performed the condition, and hence he had acquired no interest whatever in the principal. As to the defendant the Farmers' Loan and Trust Company, the trustee named in the will, it is difficult to comprehend how it may be held to account for the trust fund which it paid over after the discharge of the trustee in bankruptey and of the bankrupt son, under and in pursuance of a formal decree of the Surrogate's Court. The demurrer must be sustained with costs.

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department, in the County of New York, on the 14th day of March, 1913.

Present:

Hon. George L. Ingraham, Presiding Justice.
 " Frank C. Laughlin,
 " John Proctor Clarke,
 " Francis M. Scott,
 " Victor J. Dowling,
Justices.

4009.

J. HARRY HULL, as Trustee in Bankruptey of Francis J. Palmer,
 etc., App'l't,

v.

FRANCIS J. PALMER and THE FARMERS' LOAN & TRUST CO., Impl'd,
 Resp'ts.

Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on the Report of Referee.

An appeal having been taken to this Court by the plaintiff from a judgment of the Supreme Court entered on the 25th day of June, 1912, and the said appeal having been argued by Mr. Walter S. Heilborn of counsel for the appellant, and by Mr. Gerrit Smith and
 32 Mr. Edw. H. Blanc of counsel for the respondents; and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be, and the same is, hereby, in all things, affirmed, and that the respondents recover of the appellant the costs of this appeal.

Enter.

G. L. I.

Judgment.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN & TRUST COMPANY, Defendants.

An appeal having been taken by the above named plaintiff to the Appellate Division of the Supreme Court of the State of New York in the First Department, from a judgment of the Supreme

Court in the above entitled action entered on the 25th day
33 of June, 1912, in the office of the Clerk of the County of
New York, sustaining the demurrers of the above named defendants Francis J. Palmer and The Farmers' Loan and Trust Company, impleaded to plaintiff's complaint herein, and dismissing said complaint and said appeal having been duly argued and the said judgment so appealed from having been unanimously, in all things, affirmed with costs of said appeal to respondents, and the remittitur having been filed on the 17th day of March, 1913, in the office of the Clerk of the County of New York,

Now, upon motion of Howe, Smith & Howe, attorneys for said defendant-respondent, Francis J. Palmer, and of Geller, Rolston & Horan, attorneys for said defendant, The Farmers' Loan and Trust Company, it is

Adjudged, that the said judgment and decree entered herein in the office of the Clerk of the County of New York on the 25th day of June, 1912, so appealed from as aforesaid, be, and the same hereby is, in all things, affirmed with One hundred and twenty-one and .20/100 dollars costs of said appeal to the respondents, and that said respondents have execution therefor against the plaintiff herein.

34

Notice of Appeal to Court of Appeals.

Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff,
against

FRANCIS J. PALMER, SARA H. PALMER, and HARRIET M. PALMER
and THE FARMERS' LOAN & TRUST COMPANY, Defendants.

SIR: Please take notice that the plaintiff, J. Harry Hull, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, hereby appeals to the Court of Appeals of the State of New York, from the Judgment of the Supreme Court entered in the office of the Clerk of the County of New York on the 31st day of March,

1913, affirming the judgment herein entered on the 25th day of June, 1912, upon an order of the Appellate Division of the Supreme Court, First Judicial Department, dated March 14th, 1913, and said plaintiff, J. Harry Hull, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, appeals from the said order of affirmance of the Appellate Division made and entered herein on the 14th day of March, 1913, and the said plaintiff, J. Harry Hull, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt appeals from each and every part of said judgment and said order of the Appellate Division.

Yours, etc.,

GALLERT & HEILBORN,

*Att'ys for Plaintiff, J. Harry Hull, as Trustee
in Bankruptcy of Francis J. Palmer, Bankrupt.*

Office & P. O. Address, 31 Liberty Street, Manhattan, New York City.

William F. Schneider, Esq., Clerk of the County of New York.
Messrs. Howe, Smith & Howe, Attorneys for Defendant, Francis J. Palmer, 2 Rector Street, Manhattan, New York City.

Messrs. Gellar, Ralston & Horan, Attorneys for Deft., Farmers' Loan & Trust Co., 22 Exchange Place, Manhattan, New York City.

SCOTT, J.:

This action is brought by the Trustee in Bankruptcy of Francis J. Palmer who was adjudicated a bankrupt on his own petition on July 22nd, 1907. On September 11th, 1907, the plaintiff was appointed and qualified as trustee of the bankrupt estate, and on November 8th, 1907, he presented his report and was discharged. Thereafter on May 7th, 1908, bankrupt was duly discharged of all his debts. On May 3rd, 1911, upon the petition of those who had been creditors of said bankrupt, the estate of said bankrupt was reopened for the purpose of administering upon the fund sought to be reached by this action, and on May 20th, 1911, the plaintiff was re-appointed Trustee of said estate. It is not alleged that the discharge of the bankrupt from his debts has been vacated, or set aside or otherwise disturbed.

Besides stating the foregoing facts the complaint discloses the cause of action relied upon as follows: Charles Palmer the bankrupt's father died in the City of New York on or about March 11th, 1907, leaving a last will and testament which was thereafter duly admitted to probate. In addition to many other bequests he made, by the fourth paragraph of his will, the following provision for Francis J. Palmer, the bankrupt: "Fourth: I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers' Loan and Trust Company, the

37 sum of Fifty thousand dollars, to be held by said, The Farmers' Loan and Trust Company, in trust, for the following uses and purposes, to wit, to invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund at the lawful issue of my said son him surviving, in equal shares per stirpes, and in default of such issue to pay the income from said
38 fund quarterly to my said daughter Rosalie H. Coleman, during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to divide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living in equal shares per stirpes, to their own use, absolutely and forever."

After Francis J. Palmer's discharge in bankruptcy the Farmers' Loan and Trust Company instituted a proceeding in the Surrogate's Court of Kings County for the judicial settlement of its accounts, wherein, as it is stated in the complaint, "it was determined by said Court that the interest of the defendant, Francis J. Palmer in and to the principal of said trust fund had by his discharge in bankruptcy become a vested interest, and that the trust created by the Fourth Paragraph of the last will and testament of said Charles Palmer was thereby terminated, and that the condition in said will of said Charles Palmer contained was thereby fulfilled and said trust of fifty thousand dollars determined." Thereafter the trust company paid over to Francis J. Palmer in cash and securities, the principal of said trust fund amounting, as it is said, to more than \$48,500. It is alleged that said Palmer still holds, in his own custody and control some portion of the principal of said trust fund, and has transferred other portions thereof, voluntarily and without consideration, to certain other persons. It is also alleged that the

claims filed and allowed against the estate of said bankrupt exceeded \$23,000, and with interest, costs, disbursements and allowances in the administration of the bankrupt estate would 39 now exceed the sum of \$48,000, and that the trustee has now in his hands no assets of said estate, and that the only asset of the estate is the principal of said trust fund. The relief sought is that Francis J. Palmer and his transferees account for and pay over to plaintiff the moneys and property representing the trust fund and any income derived therefrom by them or either of them, and that the Farmers' Loan and Trust Company account for and pay over to the plaintiff so much of the trust fund and the interest thereon from August 24th, 1910 (the date when said fund was paid over to Francis J. Palmer), as may not be recovered from said Palmer and his transferees.

There are certain allegations of law contained in the complaint as to the legal effect of the acts alleged, which not being admitted by the demurrer, are not included in the foregoing analysis. The defendants Francis J. Palmer and Farmers' Loan and Trust Company, being the only defendants before the Court, demur separately, First, that the plaintiff as trustee in bankruptcy of the estate of Francis J. Palmer has no legal capacity to sue for the fund involved in this action, for the reason that no right, title or interest in or to the said fund ever vested in him, and Second, that the said complaint does not state facts sufficient to constitute a cause of action.

The claim of plaintiff-appellant is that, under the will of his father, Francis J. Palmer acquired a contingent interest in the fund of \$50,000 to become vested when he "should become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund;" that this condition became satisfied when the said Francis J. Palmer 40 was discharged in bankruptcy and his debts thereby cancelled; that the condition being thus fulfilled the absolute right to the ownership and possession of the trust fund vested in the trustee in bankruptcy as the owner of the contingent interest therein, and that the principal sum should therefore be paid over to him to be applied to the payment of the debts, the extinguishment of which by the discharge in bankruptcy converted the contingent interest in the fund into a vested interest.

The plaintiff's chief reliance is upon *National Park Bank v. Billings* (144 App. Div., 536, aff'd on Op. below, 203 N. Y., 556) wherein it was held that a contingent future interest in personal property was alienable, and could be reached in a judgment creditor's action, and *Tuck v. Knapp* (42 Misc., 140), a case somewhat similar to the present although not entirely so.

It is desirable therefore, at the outset, to consider the precise condition upon which, under his father's will, Francis J. Palmer might receive the principal of the fund put in trust for his benefit. In the first place there is no express gift to him either in future or in praesenti, nor is there to be found a distinct direction to the trustee to pay the principal over to him at any time or upon any condition.

The one controlling condition which attached to the payment of the fund to the son Francis J. Palmer is not only that he shall become financially solvent, but also that he shall become "able to pay all his just debts and liabilities from resources other than the principal of this trust fund." The trustee was made the sole judge

41 as to whether this condition had been complied with, and having received satisfactory evidence on that point it was "authorized and empowered," not directed, to pay over the principal to the son "in its own judgment and without its judgment in such case being subject to revision by any other authority," so that the ultimate event upon which payment to the son was to take place was the exercise of the trustee's judgment, which, however, was so limited that it could not be exercised in favor of paying over the principal until it was satisfied that the condition as to solvency and ability to pay his debts had arrived. If we contrast the provisions of this will with those contained in the two cases mainly relied upon by the plaintiff we shall discern radical differences. In *National Park v. Billings*, supra, the testator made a bequest to trustees for the benefit of his wife for her life. At her death he provided: "It is my will and I direct that my trustees and executors or the survivor of them do and shall, at once upon the death of my wife divide the principal of my estate * * * and set apart one share, one half part, for my son or his issue * * *." If the son had not attained the age of twenty-five years the share was to be held by him until he attained that age, and then paid over to him. If he died before the death of his wife, or after her death and before attaining the age of twenty-five years his share was to be paid to his issue. It was held that the will did contain a gift to the son, not in express words, but in a direction to the trustees to divide and pay, which was held to be equivalent to an express gift in praesenti

42 with futurity attached only to the right of possession. It was therefore found, by analogy to the rules affecting de-

vises of real estate, that the will created a present property interest which he could assign which therefore could be reached by his creditors; that the son "acquired upon the death of his father, not a bare possibility merely, but the right to the possession and enjoyment of one half of his father's estate in the event that he should attain the age of twenty-five years and survive the mother," and "that right was not subject to the will of a third party." It is apparent that the will of Charles Palmer, the bankrupt's father, produced a very different condition of affairs. A trustee in bankruptcy, of course, takes no higher estate or greater interest than the bankrupt himself possesses when the trustee is appointed, and the title which the trustee acquires by virtue of his appointment is no better than he would have acquired if the bankrupt had made an assignment to him. Let us suppose that the bankrupt had, in fact, assigned to the trustee his conditional right to be paid the principal of the trust fund. That of itself would carry no right to payment of the principal, for the condition must first be complied with. That condition was that all debts and liabilities should be paid "from resources other than the principal

of the trust fund." It certainly would not fulfill this condition if the trustee were to demand possession of the principal in order to apply it to the payment of the bankrupt's debts, and it is equally certain that the Trust Company could not lawfully pay the principal

over either to the bankrupt or the trustee until it was satisfied
43 that the bankrupt had acquired financial ability from re-

sources other than the trust fund itself to pay all of his liabilities. To argue otherwise is to travel in a circle. We may leave out of sight for the present the fact that the Trust Company has already paid Francis J. Palmer, for the plaintiff claims that it had no right to do so, and consider the question as if the fund were intact in the hands of the Trust Company, from whom plaintiff seeks to collect it. His right to do so would be predicated upon the proposition that Francis J. Palmer's debts were cancelled by his discharge in bankruptcy, and consequently that he had no debts and liabilities to be satisfied, and therefore that the conditions in the will had been satisfied. At the same time, however, in order to justify his claim as trustee to collect the fund, he would be compelled to assert there still were creditors of Palmer who were entitled to have his property applied to payment of their debts and that it was his purpose, as it would be his duty, if he obtained the principal of the fund to apply it to the payment of these creditors. A case somewhat similar to the present, though much stronger for the trustee in bankruptcy, was Hasbrouck v. Follett, decided at the Kings County Special Term. No opinion was written except at Special Term, and that is not reported. The decision sustaining a demurrer to the complaint was affirmed by the Appellate Division (57 App. Div., 627) and by the Court of Appeals (171 N. Y., 674) in both cases without opinion. The case on appeal is on file in the library of the Association of the Bar and from it can be ascertained

the facts and the point decided. One, Ann Henderson, left
44 a will by which, among other things she gave one third of

her residuary estate to the defendant Follett, as trustee, for the benefit of a daughter Frances A. Davenport, with a condition that: "If Frances A. Davenport shall at any time certify in writing to the then trustee of the trust that she has satisfactorily compromised, adjusted or become freed from any and all claims now outstanding against her, whether now in judgment, suit or otherwise, then said trust shall terminate and said trust fund or estate shall go to her and become hers absolutely." Frances A. Davenport went into bankruptcy, and her trustee in bankruptcy claimed, as does this plaintiff, to have become vested, by virtue of his appointment, of her conditional right to receive the corpus of the trust estate. He entered into an agreement with all of her creditors for the compromise of their debts, at a figure which would enable him to pay them out of the trust fund if he should receive it. He thereupon, acting as he claimed in the right of bankrupt, notified said trustee under the will that he had compromised and adjusted all of the claims against the bankrupt, and demanded that the trust fund be paid to him. Being refused he sued, and his complaint was demurred to as in the present case. The Court as Special Term

sustained the demurrer, the Court saying: "It is clear from the language and scope of the will of said Ann Henderson that she intended to provide a fund for the support of her daughter, that could not be reached or applied to the payment of debts. The words 'compromised' and 'adjusted' in the fifth clause of the will, like the words immediately following were designed to operate and 45 did operate to prevent the bankrupt, her trustee or any other person from terminating the trust and acquiring the property prior to the actual payment or extinguishment of her debts." Tuck v. Knapp, *supra*, upon which the plaintiff also greatly relies, was even more unlike the present case, than was the National Park Bank v. Billings. In that case the testator bequeathed all of his estate to his son Charles W. Knapp in trust (1) to set aside a fund of \$2,000 and to pay the income thereof to a daughter for life, and (2) to set aside the balance of the estate as a fund by itself and pay the income to said Charles W. Knapp, and (3) to pay said balance of the estate to the said Charles W. Knapp at any time after he should have satisfied such judgments as existed against him at the time of the death of the testator. Charles was adjudged a bankrupt and discharged from his debts. It was held that Charles, being trustee and beneficiary took a legal estate in the fund of the same quality, duration and subject to the same conditions as his beneficial estate, and hence that his trustee took both the legal and equitable estate subject only to the condition that the judgments against him were satisfied, which conditions, as it was considered, had been fulfilled by the discharge in bankruptcy. In the present case there is no ground for the claim that the bankrupt held at the time of his adjudication or that his trustee acquired the legal or equitable title to the fund now sought to be followed.

That Francis J. Palmer should satisfy the Trust Company that he was "solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund," and 46 that the Trust Company should theretupon decide "in its own judgment" that the fund should be paid to him were clearly conditions precedent to be performed before he acquired any right or title to the trust fund (*Kenyon v. See*, 94 N. Y., 563; *Booth v. Baptist Church*, 126 N. Y., 241). That condition had not been complied with when he became adjudicated a bankrupt and was never complied with until his debts *and* been extinguished by his discharge. He had therefore no title to the fund at the time of his adjudication which he could have assigned, or which passed to his trustee, and consequently the latter never acquired any such title.

We do not consider that the decree of the Surrogate's Court, referred to in the complaint, affects in any way the issues involved in the present action. It certainly is not res adjudicata of any question because the proceeding was not between the same parties or their privies. In any aspect it can only be considered as advisory to the Trust Company, as trustee, which still had the right and was bound, under the terms of Charles Palmer's will, to form its own judgment as to the propriety of paying over the principal

"without its judgment in such case being subject to revision by any other person or authority."

We have treated the case, for convenience of discussion, as if the fund still remained in the bands of the trustee under the will, from whom the trustee in bankruptcy seeks to recover it. It is quite evident that the fact that the Trust Company has already paid over the principal to Francis J. Palmer, cannot help the plaintiff's cause of action. His claim, if he has one, must relate back to the time of the adjudication in bankruptcy and find its foundation in the interest which Francis J. Palmer then had, and which, as plaintiff asserts, then became vested in his trustee in bankruptcy. The bankrupt estate is fixed as of the date of the adjudication in bankruptcy, and property acquired after that date is free from all claims by the trustee in bankruptcy (Bankruptcy Act, §70; Collier on Bankruptcy, 7th Ed., pp. 809-810).

It follows that the judgment appealed from must be affirmed with costs.

All concur.

Waiver of Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll, and the whole thereof now on file in the office of the Clerk of the County of New York; and certification thereof by the clerk of said county, pursuant to Section 1353 is hereby waived.

Dated, Jan. —, 1914.

GALLERT & HEILBORN,

Attorneys for Plaintiff-Appellant,

GELLER, ROLSTON & HORAN,

Atty's for Defendant-Respondent,

Farmers' Loan and Trust Company.

HOWE, SMITH & HOWE,

Atty's for Defendant-Respondent,

Francis J. Palmer.

Order on Remittitur.

At a Special Term of the Supreme Court of the State of New York held at Part 2 thereof, in and for the County of New York at the County Court House, in the Borough of Manhattan and City of New York, on the 12th day of January, 1915.

Present: Hon. John W. Goff, Justice.

J. HARRY HULL, as Trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, Plaintiff-Appellant,
against

FRANCIS J. PALMER, SARA PALMER, HARRIET M. PALMER AND THE Farmers' Loan and Trust Company, Defendants; Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants-Respondents.

The above named J. Harry Hull, as Trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court in the First Department, entered in the office of the Clerk of the County of New York on the 31st day of March, 1913, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed, and that the respondents recover against the Appellant costs of appeal to said Court of Appeals and the remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York,

Now, on motion of Howe, Smith & Howe, Attorneys for Francis J. Palmer one of the above named respondents it is

49 Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of this Court, and that the judgment entered herein on the 31st day of March 1913, be and the same hereby is affirmed, and that a judgment of this Court be entered herein affirming said judgment with costs of said appeal to be taxed against the said J. Harry Hull, as Trustee aforesaid in Bankruptey, of the estate of Francis J. Palmer Bankrupt, said appellant.

Enter.

(Signed)

J. W. G. J. S. C.

49½ [Endorsed:] New York Supreme Court, New York County. J. Harry Hull, as Trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, Plaintiff-Appellant, against Francis J. Palmer, Sara Palmer, Harriet M. Palmer and the Farmers' Loan and Trust Company, Defendant; Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants-Respondents. Order on Remittitur. Howe, Smith & Sawyer, Attorneys for Francis J. Palmer. Office and Post Office Address, 3 Rector Street, Borough of Manhattan, New York City.

50

Judge.

New York Supreme Court, New York County.

J. HARRY HULL, as Trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, Plaintiff-Appellant,
against

FRANCIS J. PALMER, SARA PALMER, HARRIET M. PALMER AND
The Farmers' Loan and Trust Company, Defendants, Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants-Respondents.

The above named J. Harry Hull, as trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court in the First Department, entered in the office of the Clerk of the County of New York, on the 31st day of March, 1913, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from, be in all things affirmed, and judgment rendered for the respondents with costs, and the remittitur from the Court of Appeals having been filed in the office of said Clerk of New York County on the 12th day of January, 1915, and an order having been on that day made and entered thereon, making the judgment of the Court of Appeals the judgment of this Court, and directing the entry of the judgment of affirmation herein with costs of appeal to respondents, to be taxed against the said J. Harry Hull as trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, said appellant.

51 Now, on motion of Howe, Smith & Howe, Attorneys for Francis J. Palmer, one of the above named respondents it is,

Adjudged that the judgment in this action entered on the 31st day of March, 1913, be and the same hereby is affirmed, and that the respondents Francis J. Palmer and Farmers' Loan and Trust Company recover of the said J. Harry Hull, as trustee in Bankruptey of the estate of Francis J. Palmer, Bankrupt, the sum of 146 70/100 Dollars, the amount of their costs herein as taxed.

Judgment entered Jan. 18, 1915.

WM. F. SCHNEIDER, Clerk.

51½ [Endorsed:] New York Supreme Court, New York County. J. Harry Hull, as Trustee in Bankruptey of the Estate of Francis J. Palmer, Bankrupt Plaintiff-Appellant, against Francis J. Palmer, Sara Palmer, Harriet M. Palmer and The Farmers' Loan and Trust Company, Defendants; Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants-Respondents. Judgment. Howe, Smith & Sawyer, Attorneys for Francis J. Palmer, Office & P. O. Address 2 Rector Street, Borough of Manhattan, New York City.

52 UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of New York,
Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, bankrupt, plaintiff against Francis J. Palmer and the Farmers' Loan and Trust Company and Sara H. Palmer and Harriet M. Palmer, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause

of the said Constitution, treaty statute, or commission; a

53 manifest error hath happened to the great damage of the said plaintiff as by complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, on or before December 19, 1915, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 2nd day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal District Court of the United States, Southern District
of N. Y.]

ALEX. GILCHRIST, JR.,
*Clerk of the District Court of the United
States of America, for the Southern
District of New York, in the Second
Circuit.*

The foregoing writ is hereby allowed.

53½ [Endorsed:] Supreme Court of the State of New York.
 J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, Plaintiff in error, against Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants in error; Sara H. Palmer and Harriet M. Palmer, Defendants. Original Writ of Error. Received Dec. 10, 1915. Gallert & Heilborn, Attorneys for plaintiff in error 31 Liberty Street, New York City.

54 Court of Appeals of the State of New York.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff in Error,
 against
 FRANCIS J. PALMER and THE FARMERS' LOAN AND TRUST COMPANY, Defendants in Error; Sara H. Palmer and Harriet M. Palmer, Defendants.

To Hon. Willard Bartlett, Chief Judge of the Court of Appeals of the State of New York:

The petition of J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, Bankrupt, the plaintiff in error, and the plaintiff below, by Gallert & Heilborn, his attorneys, respectfully shows:

First. The plaintiff is the Trustee in Bankruptcy duly elected of the defendant Francis J. Palmer who filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, on the 22nd day of July, 1907, on which day he was duly adjudicated a bankrupt.

Second. On November 8, 1907, the plaintiff presented his final report as said Trustee and was thereafter discharged of his trust.

Third. On May 7, 1908, the defendant Francis J. Palmer was duly discharged of all his debts.

55 Fourth. On May 3, 1911, the District Court of the United States for the Southern District of New York ordered that the estate of Francis J. Palmer, in bankruptcy, should be reopened for the purpose of administering upon the principal of the trust herein-after described, and the plaintiff on May 20th, 1911, was duly elected the Trustee in Bankruptcy of said Francis J. Palmer, and has duly qualified as such Trustee and is still acting as such.

Fifth. On March 11, 1907, and prior to the filing of said petition in bankruptcy, Charles Palmer died at the City of New York, a resident of the State of New York, leaving him surviving the defendant Francis J. Palmer, for whom he provided in his will as follows:

"Fourth. I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers' Loan and Trust Company, the sum of Fifty thousand dollars, to be held by said The Farmers' Loan and Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the

use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such

case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his

receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, per stirpes, and in default of such issue to pay the income from said fund quarterly to my said daughter Rosalie H. Coleman during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to divide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living in equal shares per stirpes, to their own use, absolutely and forever.

Sixth. The said Will was duly admitted to probate, and the defendant Farmers' Loan and Trust Company qualified as the executor and trustee thereunder and received the principal fund of said trust.

Seventh. That on information and belief, thereafter proceedings were had in the Surrogate's Court in the County of Kings, a Court of competent jurisdiction, in a proceeding for the judicial settlement of the account of The Farmers' Loan and Trust Company as executor under the last will and testament of said Charles Palmer, deceased, to which said Francis J. Palmer and said Farmers' Loan and Trust Company were parties, wherein it was determined by said Court that the interest of the defendant, Francis J. Palmer in and to the principal of said trust fund had by his discharge in bankruptcy become a vested interest and that the trust created by

57 the 4th paragraph of the last will and testament of said Charles Palmer was thereby terminated, and that the condition in said will of said Charles Palmer contained was thereby fulfilled and said trust of said Fifty Thousand dollars determined.

Eighth. On information and belief, the said Farmers' Loan and Trust Company, as Trustee, as aforesaid, had on May 7th, 1908, and thereafter, as the principal of said trust fund cash and personal property in excess of \$48,500 and on or about the 24th day of August, 1910, paid to the defendant, Francis J. Palmer the sum of \$28,469.18 in cash and delivered ten one thousand dollar bonds of the Canadian

Southern Railway Company and ten one thousand dollar bonds of the Union Pacific Railway Company and said cash and said bonds were at all times and still are the property of the bankrupt estate herein and the trustee in bankruptcy herein was at all times entitled to said moneys and to said bonds and to all the principal of said trust estate.

Ninth. On January 5, 1912, the plaintiff in error commenced an action against the said defendants in error and against the said defendants in the Supreme Court of the State of New York praying that the said defendant Francis J. Palmer be ordered to pay to the plaintiff any and all balances of principal of said trust fund now possessed in kind by said defendants and each of them and any property purchased therewith, and that he have judgment against the Farmers' Loan and Trust Company for the difference between the value of said trust fund and the amount thereof recovered
58 from the said defendant Francis J. Palmer.

The summons and complaint were served on the defendant Farmers' Loan and Trust Company, and thereafter on January 27, 1912, the defendant Farmers' Loan and Trust Company interposed a demurrer thereto and on the 1st day of February, 1912, the defendant in error Francis J. Palmer interposed a demurrer thereto, both demurrs being on the same ground, to-wit:

"1. That the plaintiff, as trustee in bankruptcy of the estate of Francis J. Palmer, has no legal capacity to sue for the fund involved in this action, for the reason that no right, title or interest in or to said fund ever vested in him.

11. That said complaint does not state facts sufficient to constitute a cause of action.

Tenth. That said issue of law came to trial in the Supreme Court, New York County before the Hon. Samuel Greenbaum, Justice, and on June 11, 1912, the decision of said trial Justice was rendered in favor of said defendants in error sustaining the said demurrer and dismissing the complaint with costs, and thereafter judgment was entered in favor of said defendants in error dismissing the complaint with costs in favor of the defendants in error for Forty-seven and 95/100 (\$47.95) dollars.

Eleventh. On or about June 28, 1912, an appeal was taken by the plaintiff in error from said judgment to the Appellate Division of the Supreme Court for the First Department for the State of New York, and on March 14, 1913, the said Appellate Division unanimously

59 ordered that the judgment so appealed from should in all things be affirmed. Thereafter a judgment was entered in the Supreme Court, New York County affirming said judgment with costs against the plaintiff in error for One hundred and twenty-one and 20/100 (\$121.20) dollars. Said judgment was entered on the 30th day of March, 1913.

Twelfth. From the said judgment of affirmance on or about the 7 day of April, 1913, the said plaintiff in error appealed to the Court of Appeals of the State of New York, the same being the highest court in said state in which a decision in said suit could be had, and on January 5, 1915, the said Court of Appeals rendered a decision

affirming the judgment theretofore entered with costs to the defendant in error.

Thirteenth. That on or about the 5th day of January, 1915, the Court of Appeals made judgment and decree in said suit, directing that the order of the Appellate Division be affirmed and that the record be removed to the Supreme Court of the State of New York to be enforced according to law. That the said record was thereupon removed accordingly, and was filed in the office of the Clerk of the Supreme Court in and for the County of New York, on the 15 day of January, 1915; whereupon the said Supreme Court in obedience to the order and judgment of the Court of Appeals, and in accordance with the law and practice of the State of New York,

gave final judgment in said suit or action, adjudging that the
60 judgment of the Court of Appeals be made the judgment of the Supreme Court, and that the order of the Appellate Division of said Supreme Court bearing date the 14th day of March, 1913, and the judgment of the Special Term of said Supreme Court entered on June 11, 1913, be affirmed, and that the said judgment so entered was in the highest court in said State in which a judgment in said suit could be had.

Upon the trial of said issue at law at Special Term, and before the Appellate Division of the Supreme Court, and before the Court of Appeals, your petitioner duly argued, contended and insisted that the interest of Francis J. Palmer in the principal sum of Fifty thousand (\$50,000) dollars bequeathed to him in the 4th paragraph of the will of Charles Palmer was property which prior to the filing of the petition in bankruptcy the bankrupt could by some means of transfer and which might have been levied upon and sold under judicial process against him, and therefore under the provisions of Section 70 of the Bankruptcy Act of the United States of America title thereto had vested in your petitioner.

What upon the trial of said action and before the Appellate Division and the said Court of Appeals, your petitioner duly argued and asked that the demurrers of the defendants in error should be overruled upon the ground that the said interest of said defendant in error Francis J. Palmer in the principal sum of Fifty thousand (\$50,000) dollars was a future contingent interest in the principal
61 of personal property, which under the laws of the State of New York was assignable, and which might have been levied

upon and sold under the judicial process and that therefore it was property title to which vested in the plaintiff in error as the Trustee in Bankruptcy of said Francis J. Palmer.

Your petitioner further avers that the decisions and judgments of said trial court and of the said Court of Appeals constituted a denial of a right and title specially claimed under a statute of the United States.

In its opinion rendered by Judge Miller, the Court of Appeals used the following language:

"The decision in this case turns on the question whether the plaintiff upon his appointment as trustee, on September 11, 1907, acquired title to any interest of the bankrupt under the said fourth clause of

the will of his father, because, if he did not, there was no unadministered assets for him to be re-appointed to administer.

I shall assume that the testator bequeathed to his son a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition, upon which the trust was limited, was fulfilled, and I shall assume, also, that that interest was assignable under the authority of National Park Bank v. Billings (203 N. Y.) 556). It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors."

213 N. Y. 315 at page 320.

Your petitioner therefore avers that the Court of Appeals of the State of New York, that being the highest court in said State of New York has decided that the interest of the defendant Francis J. Palmer in the principal of said fund was assignable.

Fourteenth. That the said decisions and judgments of said courts and judgments and each of them denied to your petitioner a title, right, privilege and immunity held by your petitioner under the Constitution and Statutes of the United States, to the great
62 prejudice of your petitioner, all of which will in more detail appear by the record and assignment of errors herein.

Wherefore your petitioner prays for a writ of error directed to the Supreme Court of the State of New York, commanding that court to send the record of the proceedings in said suit or action aforesaid, and all things concerning the same, duly authenticated, to the Justices of the Supreme Court of the United States, and for the usual citation to the end that the record of the proceedings being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein to correct all error, what by right and according to the law and Constitution of the United States ought to be done; and said writ of error operate as a supersedeas, that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security all further proceedings in said Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray.

Dated, November 12 1915.

J. HARRY HULL.

GALLERT & HEILBORN,

Attorneys for Plaintiff in Error,

31 Liberty Street, Borough of Manhattan,
City of New York.

63 STATE OF NEW YORK,
City of New York, County of New York, ss:

J. Harry Hull, being duly sworn, deposes and says that he is the Trustee in Bankruptcy of the Estate of Francis J. Palmer, bankrupt, the plaintiff in error in the above entitled action; that he has read the foregoing petition and knows the contents thereof, and that

the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon his information and belief, and as to those matters he believes it to be true.

J. HARRY HULL.

Subscribed and sworn to before me, this 12 day of November, 1915.

EDWARD D. NEWMAN,
Notary Public, N. Y. Co.

The writ of error, as prayed for in the foregoing petition, is hereby allowed, and bond is fixed in the sum of \$500#.

Dated, November 20th, 1915.

WILLARD BARTLETT,
*Chief Judge of the Court of Appeals
of the State of New York.*

63½ [Endorsed:] Court of Appeals of the State of New York.

J. Harry Hull, as Trustee in Bankruptey of the estate of Francis J. Palmer, Plaintiff in Error, against Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants in Error; Sara H. Palmer and Harriet M. Palmer, Defendants. Original Petition for Writ of Error. Gallert & Heilborn, Attorneys for Plaintiff in Error, 31 Liberty Street, New York City.

64 Court of Appeals of the State of New York.

J. HARRY HULL, as Trustee in Bankruptey of the Estate of Francis J. Palmer, Bankrupt, Plaintiff in Error,
against

FRANCIS J. PALMER and THE FARMERS' LOAN AND TRUST COMPANY, Defendants in Error; Sara H. Palmer and Harriet M. Parker, Defendants.

Now comes J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, Bankrupt, the above named plaintiff in error, by Gallert & Heilborn, his attorneys, and in connection with the writ of error filed herewith, says:

That in the record, proceedings, decision and final judgment of the Court of Appeals of the State of New York and of the Supreme Court of the State of New York, aforesaid, in the said suit or action, there is manifest error in this, to-wit:

1. Said Courts erred in holding by the affirmance of the judgment of the trial court in disregard of the Federal Constitution and the Statutes aforesaid, that the plaintiff was not vested by operation of law with the interest of the defendant in error Francis J. Palmer in the principal sum of Fifty thousand (\$50,000) dollars bequeathed to him in the following language under the will of his Father Charles Palmer:

65 "Fourth. I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to

the Farmers' Loan and Trust Company, the sum of Fifty thousand dollars, to be held by the said The Farmers' Loan and Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, per stirpes, and in default of such issue to pay the income from said fund quarterly to my said daughter Rosalie H. Coleman during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to divide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living in equal shares per stirpes, to their own use, absolutely and forever."

66 said Charles Palmer having died on the 11th day of March, 1907, and that said Francis J. Palmer having filed his petition in bankruptcy on the 22nd day of July, 1907.

2. Said Court erred in holding by the affirmance of the Appellate Division in disregard of the Federal Constitution as aforesaid that the discharge in bankruptcy of the defendant in error Francis J. Palmer did not make him financially solvent and able to pay all his just debts and liabilities from resources other than the principal of said trust fund.

3. That by the record aforesaid it appears that the aforesaid judgment was given by the Court of Appeals of the State of New York against the plaintiff below and the plaintiff in error in favor of the defendants below and the defendants in error, whereas by the law of the land and Constitution of the United States, and the Acts of Congress passed pursuant thereto, the said judgment should have

been given for the plaintiff below and the plaintiff in error, and against the defendants below and the defendants in error.

All of said errors will appear fully and at large in the record in the case of J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, bankrupt against Francis J. Palmer, Sara H. Palmer, Harriet M. Palmer and The Farmers' Loan and Trust Company, in said Supreme Court of the State of New York, which
will be duly certified to the Supreme Court of the United
67 States, and to which reference is hereby made for the detailed statement of the errors aforesaid.

The assertion of a right, privilege or immunity under the United States Constitution by the plaintiff in error was distin-ly urged upon the trial of the issue in the Supreme Court of the State of New York, before the Appellate Division of the said Court, and before the said Court of Appeals as follows:

In and by the paragraph numbered "V" of the complaint.

In and by Point One of the typewritten brief submitted to the Judge at Special Term.

In and by Point Four and Five of the printed argument of the plaintiff in error submitted to said Appellate Division of said Supreme Court.

In and by Point Five in the printed argument of plaintiff in error submitted to the Court of Appeals of the said State of New York.

Wherefore J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, bankrupt, the plaintiff below and the plaintiff in error, pray that the said judgment of the Court of Appeals of the State of New York, and the judgment of the Supreme Court of the State of New York, as aforesaid, be reversed and annulled, and altogether held for nothing, and that your petitioner be restored to all things which he has lost by the action of said judgment, etc., and that he may have such other and further relief, according to law, as to your Court may seem just and proper.

Dated. November —, 1915.

GALLERT & HEILBORN,
Attorneys for Plaintiff in Error.

Office and Post Office Address, 31 Liberty St., Borough of Manhattan, New York City.

67½ [Endorsed:] Court of Appeals of the State of New York.
J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, Plaintiff in Error, against Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants in Error; Sarah H. Palmer and Harriet M. Palmer, Defendants. Original Assignment of Errors. Gallert & Heilborn, Attorneys for Plaintiff in error, 31 Liberty Street, New York City.

68 Court of Appeals of the State of New York.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff in Error,
against
FRANCIS J. PALMER and THE FARMERS' LOAN AND TRUST COMPANY, Defendants in Error; Sara H. Palmer and Harriet M. Palmer, Defendants.

UNITED STATES OF AMERICA, 88:

To the Farmers' Loan and Trust Company and Francis J. Palmer,
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of New York, wherein J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, Bankrupt is the plaintiff in error, and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willard Bartlett, Chief Judge of
the Court of Appeals of the State of New York, this 20th
day of November, in the year of our Lord, one thousand
nine hundred and fifteen.

WILLARD BARTLETT,
*Chief Judge of the Court of Appeals
of the State of New York.*

69½ [Endorsed:] Court of Appeals of the State of New York.
J. Harry Hull, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff in Error, against Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants in Error; Sara H. Palmer and Harriet M. Palmer, Defendants. Original Citation. Gallert & Heilborn, Attorneys for Plaintiff in Error, 31 Liberty Street, New York City.

70 In the Supreme Court of the United States.

Bond on Writ of Error.

Know all men by these presents that we J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, as principal, and Burghard Steiner, of the Borough of Bronx, County of Bronx, City and State of New York, and Moritz L. Ernst, of the City, County and State of New York, as sureties, are held and firmly bound unto Francis J. Palmer and The Farmers' Loan and Trust Company, in the

full and just sum of Five hundred (\$500) dollars, to be paid to the said Francis J. Palmer and said Farmers' Loan and Trust Company, their heirs, executors, administrators successors and assigns, to which payment, well and truly to be made, we bind ourselves, our, and each of our successors and assigns, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 7th day of December, in the year of our Lord nineteen hundred and fifteen.

Whereas, lately in the Supreme Court of the State of New York, in a suit pending in said court between J. Harry Hull, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, plaintiff-appellant, and Francis J. Palmer and The Farmers' Loan and Trust Company, defendants-respondents, and Sara H. Palmer and Harriet M. Palmer, defendants, a judgment was rendered on a remittitur from the Court of Appeals of the State of New York, against the said J. Harry Hull

71 as Trustee in Bankruptcy of the estate of Francis J. Palmer, plaintiff-appellant in favor of said Francis J. Palmer and Farmers' Loan and Trust Company, defendants-respondents, and the said plaintiff-appellant having obtained from the Chief Judge of the Court of Appeals of the State of New York, a writ of error, and filed a copy thereof in the Clerk's office of the Supreme Court of the State of New York, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Francis J. Palmer and the said Farmers' Loan and Trust Company, citing and admonishing them to be and appear at the said Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such, that if the said J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer shall prosecute said writ of error to effect and answer all damages and costs, if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect.

J. HARRY HULL,
As Trustee in Bankruptcy of Francis J. Palmer.
BURGHARD STEINER.
MORITZ L. ERNST.

CITY, COUNTY, AND STATE OF NEW YORK, ss:

Moritz L. Ernst, one of the sureties named in and who executed the foregoing undertaking being duly sworn, says that he is a resident of said State of New York and a freeholder in said State, and is
72 worth twice the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

MORITZ L. ERNST.

Sworn to before me, this 8 day of December, 1915.

MELVILLE H. CANE,
Notary Public 23, N. Y. Co.

CITY, COUNTY, AND STATE OF NEW YORK, ss:

Burghard Steiner, one of the sureties named in and who executed the foregoing undertaking being duly sworn, says that he is a resident of said State of New York and a freeholder in said State, and is worth twice the sum specified in the above proceeding over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

BURGHARD STEINER.

Sworn to before me, this 8 day of December, 1915.

MELVILLE H. CANE,
Notary Public 23, N. Y. Co.

CITY, COUNTY, AND STATE OF NEW YORK, ss:

I certify that on this 8 day of December, 1915, before me personally appeared Moritz L. Ernst, to me known and known to me to be one of the individuals described in and who executed the foregoing bond, and he acknowledged to me that he executed the same.

MELVILLE H. CANE,
Notary Public 23, N. Y. Co.

73 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 10th day of December 1915, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 73 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of J. Harry Hull &c. Plff App'l't vs. Francis J. Palmer &c. D'f't R'sp't mentioned in said Writ of Error, as the same remain of record and on file in my office; and that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with proof of service of the same and the said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 15th day of December 1915.

[Seal Supreme Court of the State of New York.]

WM. F. SCHNEIDER, Clerk.

73½ CITY, COUNTY, AND STATE OF NEW YORK, ss:

I certify that on this 8th day of December, 1915, before me personally appeared Burghard Steiner, to me known and known to me

to be one of the individuals described in and who executed the foregoing bond, and he acknowledged to me that he executed the same.

MELVILLE H. CANE,

Notary Public 23, N. Y. Co.

CITY, COUNTY, AND STATE OF NEW YORK, ss:

I certify that on this 7th day of December, 1915, before me personally appeared J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, to me known and known to me to be one of the individuals described in and who executed the foregoing bond, and he acknowledged to me that he executed the same.

WALTER S. NEWHOUSE,
Commissioner of Deeds, New York City.

N. Y. Co. Cl. No. 1032; N. Y. Co. Reg. No. 17020; Kings Co. Cl. No. 53; Kings Reg. No. 7020; Bronx Reg. No. 7006.

Commission expires June 22, 1917.

73³ [Endorsed:] Court of Appeals of the State of New York.
J. Harry Hull, as Trustee in Bankruptcy of the estate of Francis J. Palmer, Plaintiff in Error, against Francis J. Palmer and The Farmers' Loan and Trust Company, Defendants in Error. Sara H. Palmer and Harriet M. Palmer, Defendant. Copy. Bond on Writ of Error. Gallert & Heilborn, Attorneys for Plaintiff in error, 31 Liberty Street, New York City. The within bond is hereby approved as to form and sufficiency of sureties. Dated, December 9th, 1915. William Bartley, Chief Judge of the Court of Appeals.

74 United States Supreme Court.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Bankrupt, Plaintiff in Error,
against

FRANCIS J. PALMER AND THE FARMERS' LOAN AND TRUST COMPANY, Defendants in Error; Sara H. Palmer and Harriet M. Palmer, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Samuel Leibowitz, being duly sworn, deposes and says I am over the age of twenty-one years; I am a clerk in the office of Gallert & Heilborn, the attorneys for the plaintiff in error below, and of David J. Gallert, the counsel for the plaintiff in error in this action. That on the 15th day of December, 1915, at No. 22 William Street, Borough of Manhattan, New York City, he served the annexed Citation, Petition for Writ of Error and allowance thereof, Writ of Error,

Assignment of Errors, and the bond on Writ of Error, with ap-

proval, on the above named Farmers Loan and Trust Company one of the defendants in error in the above entitled action by delivering copies thereof to J. Herbert Case personally and leaving the same with him, that he knew the said J. Herbert Case to be at that time one of the Vice-Presidents of said Farmers' Loan and Trust Company, defendant in error, and knew the corporation so served to be the company mentioned and described in the
 75 said Citation, as one of the defendants in error herein.

Said Samuel Leibowitz further deposes and says that on the said 15th day of December, 1915, at No. 2 Rector Street, in the Borough of Manhattan, City and State of New York, he served the annexed Citation, Petition for Writ of Error and allowance thereof, Writ of Error, Assignment of Errors, Bond on Writ of Errors, and approval thereof, on Gerritt Smith and on the firm of Howe, Smith and Howe, attorneys, by delivering copies thereof to said Gerritt Smith personally and leaving the same with him, and that said Gerritt Smith is a member of the said firm of Howe Smith and Howe. That the said firm of Howe, Smith and Howe appeared for Francis J. Palmer one of the defendants in error in the above entitled action and acted as his attorneys through all of the courts of the State of New York, and are the only attorneys who appeared for said Francis J. Palmer, and that said Gerritt Smith personally appeared for the said Francis J. Palmer in said action when it was before the Court of Appeals of the State of New York, that being the highest court of the State of New York.

SAMUEL LEIBOWITZ,

Sworn to before me, this 15th day of December, 1915.

LOUIS J. FREY,
Notary Public, N. Y. Co.

[Seal Louis J. Frey, Notary Public, New York County.]

76 STATE OF NEW YORK,
Court of Appeals, State of Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of J. Harry Hull, as Trustee, etc., v. Francis J. Palmer, et al., decided by the Court of Appeals on the fifth day of January, 1915, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany in the State of New York, this 29th day of November, 1915.

[Seal State of New York, Court of Appeals.]

J. NEWTON FIERO,
*As Reporter of the Court of Appeals
 of the State of New York.*

Attest:
 [L. s.]

R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Willard Bartlett, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of *J. Harry Hull, as Trustee, etc. v. Francis J. Palmer, et al.* decided by the said Court of Appeals on the fifth day of January, 1915, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the — day of November, in the year of one thousand, nine hundred and fifteen.

WILLARD BARTLETT,
*As Chief Judge of the Court of Appeals
of the State of New York.*

77

213 N. Y. 315.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of Francis J. Palmer, Appellant,

v.

FRANCIS J. PALMER et al., Respondents, Impleaded with others.

(Decided January 5, 1915.)

Appeal from a judgment entered March 31, 1913, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed a judgment of Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Walter S. Heilborn and David J. Gallert for appellant.

Gerrit Smith for respondent Francis J. Palmer.

Frederick Geller, and Edward H. Blanek for The Farmers' Loan and Trust Company, respondent.

MILLER, J.:

The plaintiff, a trustee in bankruptcy, seeks in this action to reach the principal of a trust fund bequeathed by the fourth clause of

the will of Francis J. Palmer's father, which provides: "I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers' Loan and Trust Company, the sum of Fifty Thousand Dollars, to be held by said The Farmers' Loan and Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the

said trustee for the payment thereof. But if my said son
78 Francis should die before the termination of this trust as
above provided, then upon his death I direct my said trustee
to divide and pay over the principal of said trust fund to the law-
ful issue of my said son him surviving, in equal shares, per stirpes,
and in default of such issue to pay the income from said fund
quarterly to my said daughter Rosalie H. Coleman during the term
of her natural life, and upon the death of the survivor of my said
son and daughter (there being no issue of my son him surviving)
to divide and pay over the principal of said fund to the issue of my
daughter Rosalie H. Coleman who shall then be living in equal
shares per stirpes, to their own use, absolutely and forever." Said
Palmer was adjudicated a bankrupt on his own petition on July
22d, 1907. On September 11, 1907, the plaintiff was appointed,
and qualified as trustee, and on November 8th, 1907, he presented
his report and was discharged. On May 7, 1908, said Palmer was
duly discharged of all his debts. Thereafter the Farmers' Loan
and Trust Company instituted a proceeding in the Surrogate's Court
for the judicial settlement of its accounts, wherein it was de-
termined: "That the interest of the defendant, Francis J. Palmer
in and to the principal of said trust fund had by his discharge in
bankruptcy become a vested interest and that the trust created
by the 4th paragraph of the last will and testament of said Charles
Palmer was thereby terminated, and that the condition in said will
of said Charles Palmer contained was thereby fulfilled and said trust
of said Fifty thousand dollars determined," and thereafter, and
on the 24th day of August, 1910, the trust company paid over to

Palmer in cash and securities the principal of said trust fund. On May 3, 1911, the estate of the bankrupt was re-opened by the order of the United States District Court for the purpose of administering upon the principal of the said trust, and on May 19th, 1911, the appellant was re-appointed trustee.

The decision in this case turns on the question whether the plaintiff upon his appointment, as trustee, on September 11, 1907, acquired title to any interest of the bankrupt under the said fourth clause of the will of his father, because, if he did not, there were no unadministered assets for him to be re-appointed to administer.

I shall assume that the testator bequeathed to his son a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition, upon which the trust was limited, was fulfilled, and I shall assume, also, that that interest was assignable under the authority of *National Park Bank v. Billings* (203 N. Y. 556). It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors. It is to be observed that this is not a case in

which a testator has undertaken to make a gift, and to keep
79 it from his donee's creditors. It might in some aspects be termed a gift to encourage the donee to pay his debts, because, only by making such payment, or by showing the ability to pay, could the donee have the gift. The condition was that the donee "shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund." The testator had a right to impose that condition. He had a right to keep his property away from his son's creditors by not giving it to the son at all, unless the latter was able to pay his debts from other resources, and in the plainest language the testator manifested an intention to do precisely that thing. Now the trustee in bankruptcy merely represents the creditors. If, upon his appointment, he acquired the contingent interest of the bankrupt, he could sell it, applying the proceeds to the payment of the bankrupt's debts. Then, upon the bankrupt's discharge, assuming that to be a payment of his debts within the intention of the testator, which may be doubted, the assignee would be entitled to demand the principal of the trust fund from the trustee. Thus, by a process of indirection the fund, which the testator gave to his son only on condition that he should become able to pay his debts, would be used for the very purpose of satisfying that condition, and of frustrating the testator's intention. The gift would vest upon the defeat of the testator's purpose, not upon the fulfillment of the condition imposed by him. It does not seem necessary, therefore, to indulge in definitions or in nice distinctions. The nature of the condition itself determines the controversy. The creditors or their representative, the trustee in bankruptcy, were prevented from acquiring the contingent interest of the bankrupt, because to permit this would prevent the gift from ever taking effect as contemplated by the testator upon the fulfillment of a valid condition imposed by him.

The plaintiff seeks to reach the fund on the theory that the

trustee has wrongfully paid it over to the bankrupt. In that view the plaintiff's rights are certainly no greater than as though the trustee still held it. The condition then has not been satisfied, because certainly the donee's discharge in bankruptcy was not a payment of his debts within the contemplation of the testator if his creditors prior to the discharge are at liberty to take the fund.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., Hiscock, Chase, Hogan, Cardozo and Seabury, JJ., concur.

Judgment affirmed.

Endorsed on cover: File No. 25,049. New York, Supreme Court. Term No. 322. J. Harry Hull, as trustee in bankruptcy of the estate of Francis J. Palmer, bankrupt, plaintiff in error, vs. The Farmers' Loan & Trust Company and Francis J. Palmer. Filed December 17th, 1915. File No. 25,049.

18

Office Supreme Court, U.
FILED
MAR 30 1917
JAMES D. MAHER

Argued by
Mr. WALTER S. HEILBORN.

Supreme Court of the United States

OCTOBER TERM—1916.

J. HARRY HULL, as Trustee in
Bankruptcy of the Estate of
FRANCIS J. PALMER, Bank-
rupt,

Plaintiff-in-Error,

against

THE FARMERS' LOAN AND
TRUST COMPANY and
FRANCIS J. PALMER,

Defendants-in-Error.

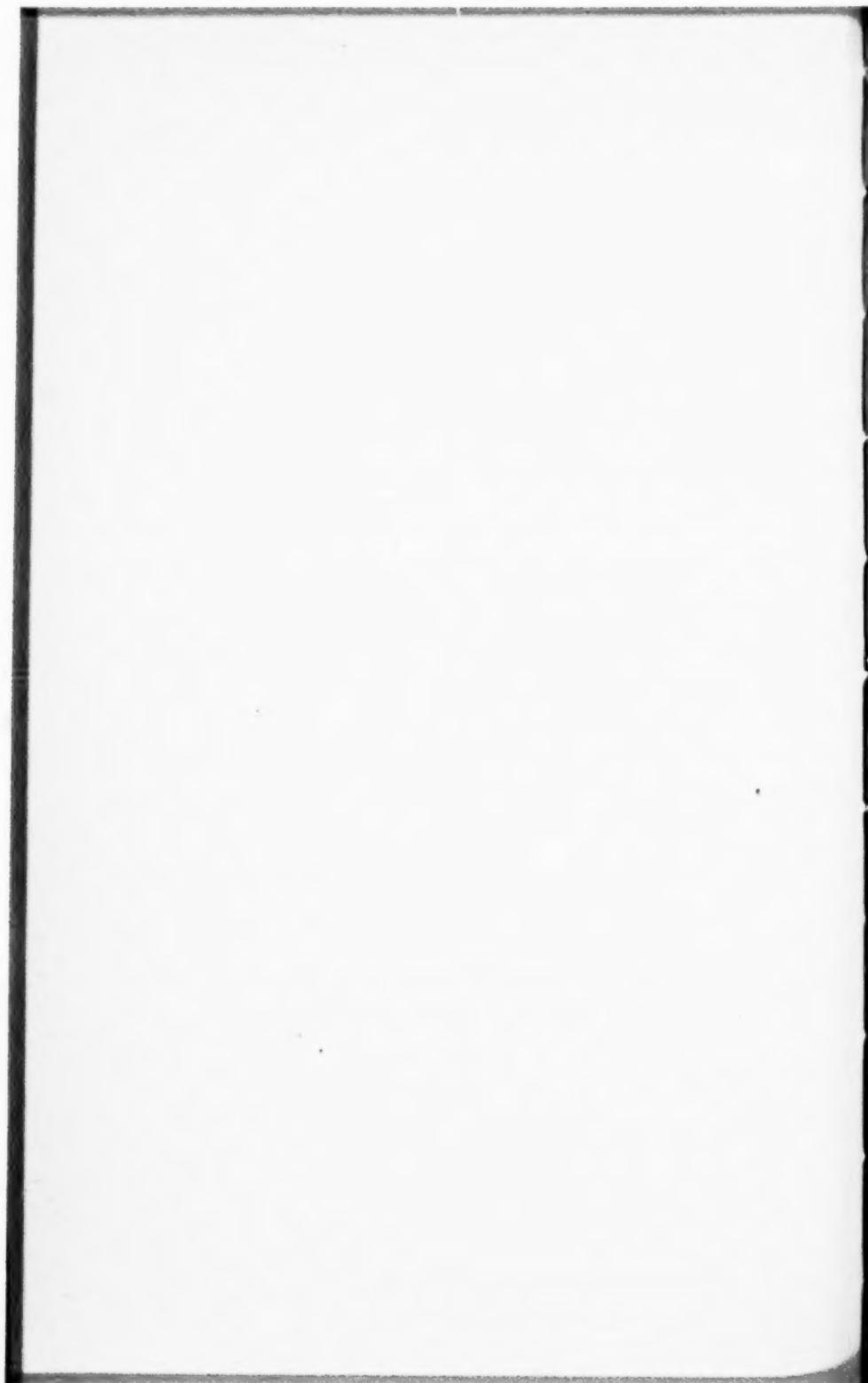
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66

BRIEF FOR PLAINTIFF-IN-ERROR.

DAVID J. GALLERT,
Attorney for Plaintiff-in-Error,
31 Liberty St.,
New York, N. Y.

DAVID J. GALLERT,
WALTER S. HEILBORN,
of Counsel.



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Statutes.

For convenience in this brief wherever we have cited New York Statutes we have referred to the last revision or codification thereof, which is known as the Consolidated Laws of 1909, but in every case the Statutes as cited herein are identical in wording with the Statutes that were in force at the time of the death of Charles Palmer, the earlier statutes being shown by the table below.

NEW YORK LAWS.

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Supreme Court of the United States

OCTOBER TERM—1916.

J. HARRY HULL, as Trustee in
Bankruptcy of the Estate of
FRANCIS J. PALMER, Bank-
rupt,

Plaintiff-in-Error,
against

THE FARMERS' LOAN AND TRUST
COMPANY and FRANCIS J.
PALMER,

Defendants-in-Error.

#322.

BRIEF FOR PLAINTIFF-IN-ERROR.

THIS CASE INVOLVES THE QUESTION
WHETHER A PROPERTY RIGHT (NOT EX-
EMPT UNDER ANY STATE STATUTE) BE-
LONGING TO A BANKRUPT AND TRANS-
FERABLE BY A BANKRUPT PRIOR TO THE
FILING OF HIS PETITION IN BANKRUPTCY
VESTS IN HIS TRUSTEE IN BANKRUPTCY
BY OPERATION OF SECTION 70a(5) OF THE
BANKRUPTCY ACT.

It comes before this Court on a writ of error di-
rected to the Supreme Court of the State of New

York. That Court sustained a demurrer to the complaint, and its judgment was affirmed by the Court of Appeals, of the State of New York, its highest Court. Thereafter the Court of Appeals remitted the record and proceedings to the State Supreme Court and an order was there entered upon the remittitur making the judgment of the Court of Appeals, the judgment of the Supreme Court. Judgment thereon was duly entered in the New York Supreme Court (Record, pages 25 and 26).

The Facts.

The portions of the complaint, material on the questions raised in this court, are as follows:

On or about the 11th day of March, 1907, one Charles Palmer died leaving a last will and testament (Record, page 5) which was duly probated on or about the 9th day of April, 1907 (Record, page 3), which last will and testament contained the following clause:

“FOURTH.—I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers’ Loan and Trust Company, the sum of Fifty thousand dollars, to be held by said The Farmers’ Loan and Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term

of his natural life. *It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund.* In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, per stirpes, and in default of such issue to pay the income from said fund quarterly to my said daughter Rosalie H. Coleman during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to di-

vide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living in equal shares per stirpes, to their own use, absolutely and forever" (Record, page 6).

On July 22nd, 1907, approximately three months after the probate of the will, the defendant Francis J. Palmer filed a voluntary petition in bankruptcy and the plaintiff is the trustee in bankruptcy of his estate duly appointed and qualified as such (Record, pages 6 and 9). On the 7th day of May, 1908, said Francis J. Palmer was duly discharged in bankruptcy (Record, page 8).

Thereafter proceedings were had in the Surrogate's Court in the County of Kings, a Court of competent jurisdiction, in a proceeding for the judicial settlement of the account of The Farmers' Loan and Trust Company, as executor under the last will and testament of said Charles Palmer, deceased, to which said Farmers' Loan and Trust Company and said Francis J. Palmer were parties, wherein it was determined by said Court that the interest of the defendant Francis J. Palmer in and to the principal of the said trust fund had by his discharge in bankruptcy become a vested interest and that the trust created by the 4th paragraph of the last will and testament of said Charles Palmer had thereby terminated, and that the condition in said will of said Charles Palmer contained was thereby fulfilled and said trust of said Fifty thousand dollars determined (Record, page 8).

Matter of Farmers Loan and Trust Co.,
65 Misc. (N. Y.), 418.

Thereafter the Trust Company, pursuant to this decree of the Surrogate's Court paid over to Francis J. Palmer the principal of said trust fund (Record, pages 8 and 9).

By the complaint herein said Palmer's trustee in bankruptcy seeks to recover the amount of this fund.

The defendants demurred to the complaint on two grounds, one that the plaintiff as trustee in bankruptcy of the estate of Francis J. Palmer has no legal capacity to sue for the fund involved in this action, for the reason that no right, title or interest in or to said fund ever vested in him and two, that the said complaint does not state facts sufficient to constitute a cause of action (Record, pages 12 and 13).

It will be noticed, however, that the alleged two grounds of demurrer are simply different methods of stating the same ground.

The demurrer was sustained by the Supreme Court of the State of New York in the County of New York, on the ground that the interest of Francis J. Palmer under the will of Charles Palmer was a conditional bequest, and that such interests are not alienable (Opinion of Mr. Justice Greenbaum, Record, pages 15 and 16). This decision was affirmed by the Appellate Division, an intermediate appellate tribunal, but on the ground that the bankrupt at the time of his adjudication had no title to the fund, which he could have assigned (Opinion of the Appellate Division, Record, page 23; Hull vs. Palmer, 155 App. Div., 636).

The Court of Appeals on appeal to that Court in its opinion, assumed:

"That the testator bequeathed to his son a future contingent interest in the principal of

the trust fund and that the trustee had no discretion but to pay it over, when the condition, upon which the trust was limited, was fulfilled" (Record, page 43.)

and further assumed

"that *that interest was assignable* under the authority of National Park Bank vs. Billings (203 N. Y., 556),

but then proceeded to affirm the decision of the lower Court on the ground that

"it does not necessarily follow that such contingent interest, though assignable, could be reached by creditors,"

and held that this particular interest could not be reached by the creditors because it was not the testator's intention that it should be so reached.

It should be noted that the only property right claimed by the plaintiff before this Court is the trust of principal: while the will also contained a trust of income, that is not in anywise involved in this litigation.

It is also to be noted that although the demurrer was sustained by all three of the lower courts, the highest court of the state, the Court of Appeals, was not able to agree with the lower courts as to their reasons and practically held their reasoning erroneous.

In the highest court of the state we find that the demurrer was sustained on the ground that

"It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors."

(Opinion of the Court of Appeals, record page 43.)

Hull vs. Palmer, 213 N. Y., 315.

This puts the issue very concisely. The New York Court of Appeals holds that a *property right assignable* by the bankrupt prior to the filing of his bankruptcy does not necessarily pass to the trustee in bankruptcy. The plaintiff in error claims that under the provisions of Section 70a5 of the Bankruptcy Act, everything unless, as is not the case here, expressly exempted by state statute, that is transferable by the bankrupt prior to the filing of his petition necessarily passes to the trustee in bankruptcy.

Specification of Errors.

The plaintiff in error claims that the state courts erred in holding:

First, that he was not vested by operation of law, on his qualification as trustee, with the interest of said Francis J. Palmer, in and to the principal of the trust fund bequeathed by Charles Palmer, under the 4th clause of his last will and testament

"whenever he shall become financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund,"

because

- (1) the said Francis J. Palmer took a conditional limitation in and to the principal of said bequest;

(2) a conditional limitation under the laws of New York is an expectant estate;

(3) an expectant estate under the laws of the State of New York, is *assignable*, and

(4) whatever is assignable by the bankrupt prior to the filing of the bankruptcy petition, under the National Bankruptcy Act, necessarily passes to a trustee in bankruptcy.

Second, that the lower courts erred if holding that the discharge in bankruptcy of said Francis J. Palmer did not make him financially solvent and able to pay all his just debts and liabilities from resources other than the principal of said trust fund, and

Third, that the lower courts erred in holding that the complaint did not state any cause of action.

The Plaintiff's Position.

The plaintiff's position is that at the time Francis J. Palmer filed his petition in bankruptcy and was adjudicated a bankrupt he had under this will *a property right*, to wit, the right to receive this principal sum of \$50,000, when he should

"become financially solvent and able to pay all his just debts and liabilities from resources other than the principal";

that this property right passed to the plaintiff, his trustee in bankruptcy; and that the plaintiff as such trustee became entitled to this \$50,000 when the contingency on which the bequest was limited happened, and that said contingency has happened.

The plaintiff's position is dependent upon the following legal propositions:

First: That under the bequest to Francis J. Palmer, which has heretofore been set out, the bankrupt had an absolute right (independent of any exercise of discretion by the testamentary trustee), to the principal sum of \$50,000 when he "should become financially solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund."

Second: That such a bequest is a conditional limitation under the laws of the State of New York.

Third, That a conditional limitation under the law of the State of New York, is an *expectant estate*.

Fourth: That all expectant estates are *assignable*.

Fifth: That whatever is assignable by the bankrupt, prior to the filing of the bankruptcy petition, passes on adjudication in bankruptcy to the trustee in bankruptcy.

The Court of Appeals of the State of New York, the highest Court of that State, seems to have agreed with the plaintiff in the first four of the above propositions and to have conceded the soundness thereof when Judge Miller, speaking for that Court, said:

"I shall assume that the testator bequeathed to his son a *future contingent interest* in the

principal of the trust fund, and that the trustee had no discretion but to pay it over, when the condition upon which the trust was limited was fulfilled, and I shall assume also that that interest was *assignable* under the authority of National Park Bank vs. Billings, 203 N. Y., 556." (Record, page 43.)

But the said Court takes issue on the fifth proposition when it says:

"It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors." (Record, page 43.)

THE FEDERAL QUESTION PRESENTED HEREIN.

The question presented to this Court is, does a *contingent interest* in the principal of personal property *assignable* by the bankrupt prior to the filing of the petition necessarily pass to his trustee in bankruptcy? This depends solely upon the construction to be given to Section 70a5 of the Bankruptcy Act—a Federal question pure and simple.

Section 70 provides:

"a. The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which

prior to the filing of the petition he could by any means have *transferred*."

Therefore the plaintiff submits that the sole question before this Court is whether Section 70a5 of the Bankruptcy Act means what it says or whether the State court was correct in disregarding the plain language of the Federal statute.

POINT ONE.

Francis J. Palmer had an absolute property right (independent of any exercise of discretion by the testamentary trustee) to the principal sum of \$50,000 when he should become financially solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund.

This gift is found in two sentences of the fourth division of the will.

The first sentence thereof, being the second sentence of the fourth division of the will, is as follows:

"It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund."

The second sentence thereof, being the third sentence of said fourth division, is as follows:

"In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation), or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof."

The plaintiff contends that :

A. BY THE FIRST SENTENCE ABOVE QUOTED FRANCIS J. PALMER WAS GIVEN AN ABSOLUTE RIGHT TO THE PRINCIPAL SUM OF \$50,000, EVEN THOUGH THE WORD WISH WAS USED.

B. THE SECOND SENTENCE ABOVE QUOTED DID NOT CUT DOWN THIS ABSOLUTE GIFT BY CONFERRING UPON THE TESTAMENTARY TRUSTEE ANY DISCRETION TO WITHHOLD PAYMENT ONCE THE REQUIRED SOLVENCY WAS OBTAINED.

The New York Court of Appeals correctly sustained these propositions when it assumed

"That the testator bequeathed to his son a *future contingent interest* in the principal of the trust fund, and that the trustee had no discretion but to pay it over, when the condition upon which the trust was limited was fulfilled."

A. BY THE FIRST SENTENCE ABOVE QUOTED FRANCIS J. PALMER WAS GIVEN AN ABSOLUTE RIGHT TO THE PRINCIPAL SUM OF \$50,000, EVEN THOUGH THE WORD WISH WAS USED.

The sentence in question reads as follows:

"It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund."

It was claimed by the defendants below that by this sentence the will does not direct that payment should be made to the son in case he should become financially solvent, but simply states that "it is my wish." That a legatee or devisee obtains *absolute rights* under a will which uses "*wish*" instead of "*direct*" or some other word is the settled law of New York, and the Court of Appeals so held in the case at bar, following its many earlier decisions.

In *Colton vs. Colton*, 127 U. S., 300, the will gave all the estate to the wife of the testator and then used the following language:

"I recommend to her the care and protection of my mother and sister and *request* her

to make such gift and provision for them as in her judgment will be best."

This Court construing this provision used the following language on page 319:

"It is error to suppose that the word 'request' necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. If a testator requests his executor to pay a given sum to a particular person, the legacy would be complete and recoverable. According to its context and manifest use, an *expression of desire or wish will often be equivalent to a positive direction*, where that is the evident purpose and meaning of the testator; as where a testator desired that all of his just debts and those of a firm for which he was not liable, should be paid, as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter. Burt vs. Herron, 66 Penn. St. (16 P. F. Smith), 400. And in such a case as the present, it would be but natural for the testator to suppose that a request, which in its terms implied no alternative addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case according to the phrase of Lord Loughborough in Malion vs. Keighley, 2 Ves., Jr., 333, 529, the mode is only civility."

And then held that the mother and sister took rights which the Court could and would enforce:

"It will be the duty of the Court to ascertain after proper inquiry and thereupon to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it."

In Phillips vs. Phillips, 112 N. Y., 197, at page 204, the Court said:

"It is perfectly well settled that what are denominated precatory words, expressive of a *wish* or desire, may, in given instances, *create a trust or impose a charge*. Without a detailed consideration of the cases, it is quite clear, that, as a general rule, they turn upon one important and vital inquiry, and that is, *whether the alleged bequest is so definite as to amount and subject-matter as to be capable of execution by the Court*, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion. In the latter case there can neither be a trust or a charge, while in the former there may be, and will be, if such appears to have been the testamentary intention. The distinction is clearly drawn, and was acted upon in Lawrence vs. Cooke (104 N. Y., 632)."

The language used in the will in the above named case

"if she find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a year and also to give my brother

Edwin W. during his life the interest on ten thousand dollars (or seven hundred dollars per year), I wish it to be done,"

was very much weaker than the language used in the will at bar. Nevertheless the Court found the persons named to have a right enforceable in a court of law.

And the New York Court of Appeals has already held that "wish" similarly employed means "will."

"The criticism then strikes upon the word 'wish' in the bequest over. It is plainly used in the same sense as if he had said, 'I will,' or 'I direct.' "

Bliven vs. Seymour, 88 N. Y., 469, 476.

To the same effect as *Phillips vs. Phillips* and *Colton vs. Colton* are:

Meehan vs. Brennan, 16 App. Div., 395.
Decker vs. High Street Church, 27 App. Div., 408.

By the cited decisions of this Court and the New York Court of Appeals, the use of the term "wish" did not prevent Francis J. Palmer from acquiring a property right in the principal of the bequest.

B. THE BEQUEST WAS NOT DEPENDENT UPON THE DISCRETION OF THE TRUSTEE UNDER THE WILL.

The bequest to Francis became absolute on the happening of the named contingency. The defend-

ant trustee was given a discretion as to the evidence it might require to satisfy it that the contingency had happened, but it was given no discretion to withhold payment once the contingency had occurred and the Court of Appeals so held.

The pertinent portions of the will are found in two sentences of its fourth paragraph (Record, page 3). The first sentence in question is as follows:

"It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund."

The plaintiff submits that this sentence both makes the gift and determines the condition upon which the defendant Palmer should *have* the principal of the trust fund, to wit, when the defendant, said Palmer, should become financially solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund.

The next sentence of the will is as follows:

"In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its own judgment

may require to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof."

This sentence, it will be noted, merely prescribes certain evidences of the attainment of financial solvency on which the trustee could safely pay the money, without responsibility to the remaindermen.

In the plain and precise language of the first sentence the testator announces the time when his son should become entitled to the principal. Just as gifts of principal are made upon marriage or upon survivorship or upon any one of many imaginable contingencies, here the testator creates the contingency of attained solvency and provides that his son should "*have*," become possessed of, own, the principal when he attained the stated financial condition.

The condition named was a peculiar one, and the careful conveyancer who drew the will foresaw that the trustee named therein (whose present counsel appears to have been a witness to the will) would perhaps not care to run any risk in determining whether or not the required financial solvency had been attained by the beneficiary. Therefore the next sentence was inserted in the will, not as is suggested by the defendants to confer any discretion on the trustee, not, as requiring any condition precedent to action by the trustee but rather to remove any possibility that the trustee

should ever be compelled to defend the propriety of any payment made by it. Observe the language. First the son "*shall have* the principal sum of \$50,000 whenever he shall become financially solvent," and then in order to carry out "*this design*," he expressly "authorizes and empowers said trustee to pay over to said son, the principal of said trust fund" upon receiving a written statement from his said son.

In other words, the testator gave \$50,000 to his son when the son became solvent and authorized the trustee to pay whenever his son should write that he had attained solvency, and on the mere statement of the son the trustee could act "without further investigation." If, however, the trustee required further evidence that the defendant Palmer had attained solvency the testator provided that it might pay upon such further evidence "as it in its judgment might require, absolutely in its own judgment and without its judgment in such case," to wit, in the event of payment "being subject to revision by any person."

The trustee is not made the judge of the attainment by the son of the required condition as it was in *Higgin vs. Downs*, 101 App. Div., 119; and in *Cushman vs. Cushman*, 116 App. Div., 763, but the son was to have \$50,000 *when he shall have become financially solvent*.

To recapitulate, the will first makes a gift to Francis J. Palmer on the contingency of solvency; it then provides that if the testamentary trustee should pay on certain evidence that the contingency had happened the said trustee should be protected against any claim that the contingency had not in fact happened, but the will nowhere

provides that if the contingency happens the trustee need not pay. On the contrary having made an absolute gift in one sentence on the happening of the contingency it would seem to be clear that when the contingency happens the trustee must pay.

And the plaintiff strongly contends that the Court of Appeals was correct in assuming *that there is absolutely nothing in this will which permitted the testamentary trustee to refuse to pay when Francis J. Palmer attained this condition of financial solvency*, and

"That the testator bequeathed to his son, a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition upon which the trust was limited was fulfilled."

When Francis became solvent the trustee HAD to pay him. Once the contingency happened, the trustee had to pay. If it did not a court of equity would have compelled payment.

Furthermore in the case at bar neither defendant can be heard to say that the trustee has any discretion to require further evidence, the defendant trustee because it has actually passed upon the evidence, found it satisfactory and made the payment and the defendant Palmer because he has accepted payment.

C. ANY DISCRETION THE TRUSTEE HAD HAS BEEN EXERCISED.

It is obvious from what has been said that the trustee has exercised the only discretion it may

have had, the discretion of what evidence it might require to show that Francis J. Palmer actually attained the condition of solvency required by the will. The trustee could pay on the certificate of Francis alone, or it could require additional evidence to a certain degree and to a certain degree only. It could not require more evidence than would satisfy a Court of Equity that Francis had attained the condition, because if the trustee refused to pay on evidence that was so clear that it would satisfy a Court of Equity that Francis had attained the condition required by the will the Court would require and compel this payment.

"It is the policy of the law to limit irresponsible powers as much as possible and to subject the conduct of every person having the rights and interest of others in his powers to the regulations and control of the rules of law. Whenever the law can control the exercise of a discretionary power, it will do so."

Perry on Trusts, 6th Ed., Sec. 511A:

"If a bill be filed, the Court will, of course, inquire into the acts which may have been done in the administration of the trust, and may possibly (as has been done in many cases), require the trustee to exercise the discretion under the view of the Court."

Costababie vs. Costababie, 6 Hare, 410, quoted in Collister vs. Fassitt, 163 N. Y., 281 at 291.

"Undoubtedly the Court cannot exercise a discretion which the testator commits to an-

other, but it can see that a discretion confided is exercised in a reasonable honest and proper manner, and for the abuse of such discretion the Court will afford a remedy."

Collister vs. Fassitt, 7 App. Div., 20, at page 25.

In Collister vs. Fassitt, 163 N. Y., 281, the language used was the following:

"I direct my wife * * * out of the property hereinafter given * * * to use so much thereof for the support and benefit of my niece Georgie S. Collister as my said wife shall from time to time in her discretion think best, so to do."

This Court held in that case at page 292:

"We are of the opinion that the defendant took the residuary estate of the testator charged with the payment of a reasonable amount for the support of the plaintiff, in accordance with the terms of the will, and as she failed to honestly and fairly exercise the discretion vested in her, it was competent for a Court of Equity to ascertain the amount and decree its payment."

"It is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the Court will not ordinarily control their discretion, as to the way in which

they exercise the power, so that if a fund be applicable to the maintenance of children at the discretion of trustees, the Court will not take upon itself in the first instance, to regulate the maintenance but will leave it to the trustees. But the Court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake, the duty of exercising the discretion or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government or real or personal security and the trust fund is outstanding upon any hazardous security" (Lewin on Trusts, c., 20, §§2, 402, 403, 4th Eng. Ed.).

"In the case of Costababie vs. Costababie, 6 Hare, 410, 414, Vice Chancellor Sir James Wigram said, 'If the gift be subject to the discretion of another person so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the Court should deprive the party of that discretionary power.'

"Where a proper and honest discretion is exercised the legatee takes all that the testator gave or intended that he should have—that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy. *But it is always for the Court eventually to say, when called upon whether the discretion has been either exercised at all or exercised hon-*

estly and in good faith. * * * It will be the duty of the Court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be suitable and best under the circumstances and all particulars and details for securing and paying it."

Colton vs. Colton, 127 U. S., 300, at page 321:

"Their discretion as trustees of this fund is subject to the control of the Courts of Equity, and cannot be arbitrarily exercised so as to deprive the beneficiaries of all benefit of the fund."

Jones vs. Jones, 8 Misc., 660, at 669.

"But it is always for the Court eventually to say, when called upon whether the discretion has been either exercised at all, or exercised honestly and in good faith." (Colton vs. Colton, 127 U. S. R., 300, 310, 321.)

Dexter vs. Evans, 63 Conn., 58 at 62.

The plaintiff-in-error submits that the true construction is that the bequest is made only on the contingency of the attainment of a certain financial condition by said Francis and there was no discretion in the testamentary trustee other than as to the evidence it might require; when this contingency happened the trustee had to pay this money, and if the trustee did not pay it, it would have been compelled to pay by the Court of Equity.

Furthermore it has been held under this very will by the Court of Appeals in this case, and by

the Surrogate's Court in a proceeding in which both the defendants were parties, that Francis J. Palmer (the condition of solvency required by the will having been attained) was entitled to the principal of this trust fund irrespective of the certificate or written statement referred to in the will.

After the bankrupt had obtained his discharge in bankruptcy the executor accounted in the Surrogate's Court of Kings County, and that Court in the absence of this plaintiff (for neither the plaintiff nor his beneficiaries were parties to said accounting), ordered the payment of this \$50,000 to Francis J. Palmer.

"The conclusion is that, *whether or not the executor accepts the certificate or written statement of the beneficiary*, it is become one of the express conditions of its trust that the son shall have the principal of the trust fund, because he has become 'financially solvent and able to pay all his just' debts and liabilities from resources other than the principal of this fund. The jurisdiction of the surrogate has not been questioned and is possibly ample to justify the direction that the decree shall provide for the payment of the \$50,000 accordingly. Decreed accordingly."

Matter of Farmers' Loan and Trust Co.,
65 Misc., 418, at 422.

It is this point which distinguishes the case at bar from Nichols vs. Eaton, 91 U. S., 716. In the Nichols case the trustees had an absolute discretion to pay or not to pay. Here once the contingency

had happened, the trustee might take the simple statement of Francis or it might require in its discretion other reasonable evidence of the happening of this contingency; but it had no discretion as in Nichols vs. Eaton, to pay or not to pay, it must pay.

D. BOTH RESPONDENTS ARE BOUND BY THE DECREE MADE IN THE MATTER OF FARMERS' LOAN & TRUST CO., 65 Misc., 418.

Both these defendants were parties to the proceeding in which the above opinion was rendered and both acquiesced therein and acted thereon. *Palmer actually received and the Trust Company actually paid \$50,000 on this decision.* As a matter of fact, defendant Palmer must have asked for this construction. They are, therefore, bound by it, the defendant Palmer having actually received \$50,000 under this construction.

"But as to the adults they seem now to have been estopped from asserting that the construction placed for the past five years upon this will by the executrix and by themselves is the true one. So far as the record shows a substantial portion of the estate has been actually distributed and received by most, if not all of the adult legatees prior to the filing of the final account and in conformity with the construction given to the will by the executors. They are therefore estopped from asserting a different basis of distribution.

Matter of Marx, 117 App. Div., 890, at 893.

Therefore neither defendant can question that the bankrupt took an absolute property right under his father's will.

POINT TWO.

The bequest at bar is a conditional limitation, and therefore an estate.

In Point One it has been shown that the Court of Appeals was correct in assuming that the fourth clause of the Palmer will must be construed as giving to Francis J. Palmer an *absolute right* (independent of any exercise of discretion by the testamentary trustee) to the principal of said trust fund, when he should become financially solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund.

That such a bequest is a conditional limitation seems to be clearly settled by Statute. Section 53 of the Real Property Law of New York reads as follows:

"A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation."

Counsel for the plaintiff-in-error submit that this language exactly covers the case at bar. Francis J. Palmer was given a remainder limited on a contingency, to wit, the contingency of his becoming solvent and this contingency having happened oper-

ated to abridge and determine the precedent estate, to wit, the life estate in trust to the Farmers' Loan & Trust Co.

It is submitted that the Statute exactly covers this case and definitely settles that in the State of New York at least, Francis J. Palmer had at the time he filed his petition in bankruptcy a *conditional limitation* under his father's will. This point seems so clear that it would seem needless to devote more space to it were it not for the fact that Mr. Justice Greenbaum at Special Term, apparently decided this case on the theory that although Francis had by order of a Court of the State of New York received this \$50,000 and although the Farmers' Loan & Trust Co. had been compelled by judicial order to pay this \$50,000 to Francis, yet that nevertheless, he had no property right under this bequest. This certainly seems a strange situation a clause of a will being judicially construed in 65 Misc., 418 to require payment of \$50,000 to a legatee and the same clause, after the payment, being judicially construed to have given the legatee no property right therein. The error of the learned Trial Justice, we submit, was in considering that Francis J. Palmer, under his father's will, acquired a mere possibility whereas under the law what he in fact acquired was a *conditional limitation*. That Francis acquired a conditional limitation seems to be clear not only under Section 53 of the Real Property Law above quoted, but also under the Common Law of which Section 53 is simply declaratory.

In Leonard vs. Burr, 18 N. Y., 96, the New York Court of Appeals had before it a bequest to B "until Gloversville shall be incorporated as a village," and the Court said at page 98:

"The qualification to the devise would have created what is termed in the books a collateral limitation making the estate determinable upon an event 'collateral to the time of its continuance' (4 Kent's Com., 129; Fearne Ed. of 1826, 12 to 15 and notes). Among the instances of collateral limitation are, to a man and his heirs, tenants of the Manor of Dale, or to a woman during widowhood; or to C till the return of B from Rome, or until B shall have paid him twenty pounds (4 Kent, 129; 1 Shep. Touch, 125, 2 Crabb's Law of Real Prop., S. 2135, 2 Bl. Com., 155; Fearne, 12, 13 and notes)."

The standard illustration of conditional limitation given by the old text books is to A for life, but if B returns from Rome then to someone else.

"A conditional limitation is of a mixed nature and partakes of a condition and of a limitation; as if an estate be limited to A for life, provided that when C returns from Rome it shall thenceforth remain to the use of B."

Kent, Vol. 4, page 128.

The American Courts have unanimously adopted this old English rule set forth by Kent and have invariably held that when an estate is given to A, but if something happened then to someone else, this is a conditional limitation. Some of the numerous cases on this subject are as follows:

Battey vs. Hopkins, 6 R. I., 443, where a deed conveyed property to Elizabeth Hopkins and then provided:

"but if the said Mary E., should see fit to marry previous to the end of her said natural life, then the aforesaid property above deeded shall revert back to the said Mary E. or her heirs, executors, administrators or assigns, after marriage."

Mary E., did remarry and the Court said at page 446:

"The true effect of this deed was therefore, as we think, to convey to Elizabeth Hopkins, an estate on condition, with a gift over upon a contingency, which is in law a conditional limitation."

In Montgomery vs. Petriken, 29 Pa. St., 118, the will provided:

"In case the said William should ever recover from the present malady under which he now labours, then he is to hold all the property devised to him for his own benefit and disposal." *

The Court says at page 120:

"*The estate to arise in case William should become sane was by way of conditional limitation on the fee previously granted as may be fully seen in Smith on Ex Interests, Sec. 148, 157, and 170 to 195, being the same book referred to by counsel as 2 Fearne.*"

In Hoselton vs. Hoselton, 166 Mo., 182, lands were devised to a son so long as he shall pay the

taxes or cause them to be paid and the Court said in regard to this devise:

"Therefore the estate vested in Amos Hoselton by the will was an *estate upon limitation.*"

In Taylor vs. McCowen, 154 Cal., 798, the devise was to Charlotte Budd Armstrong for the term of her natural life and upon her death to become the property of her heirs-at-law,

"upon the condition that the said Charlotte Budd Armstrong shall continue to reside upon said lands for the period of her natural life and should the said Charlotte Budd Armstrong remove permanently from said lands during the period of her lifetime then and in that case the said lands shall become the absolute property of Albion M. Taylor of Lowell, Massachusetts."

The Court deciding the question on authority of Section 778 of the Civil Code of California which is identical with Section 53 of the Real Property Law of New York, said of this devise:

"The estate, which by the terms of the decree was vested in Mrs. Armstrong was not an *estate upon condition*, but a *conditional limitation.*"

Section 53 of the Real Property Law, it is submitted clearly shows that a bequest such as the one involved gave to Francis J. Palmer a conditional limitation and the cases above cited not only show that this statute is declaratory of Common Law, but also show that *a person who takes a conditional limitation takes an estate in property.*

The rules and principles governing interests in real property are by express provision of the New York Personal Property Law, made applicable to personal property.

"Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property."

Personal Property Law, Section 11.¹

The defendant Palmer's interest in the principal of the trust fund was an estate—and said estate was in the nature of a conditional limitation.

This, it is submitted, was found by the highest court of New York, when the writer of the opinion in the case at bar said:

"I shall assume that the testator bequeathed to his son a *future contingent interest* in the principal of the trust fund" (Record, page 43).

POINT THREE.

A conditional limitation is an expectant estate.

That a conditional limitation is an expectant estate is clearly provided in the State of New York by statute. The real Property Law provides as follows:

"Sec. 35.² Estates in possession and expectancy. Estates, as respects the time of their

¹ Personal Property, 1897, §2. See index, page 9.

² Real Property Law, 1896, §25. See index, page 9.

enjoyment, are divided into estates in possession, and *estates in expectancy*. An estate which entitles the owner to immediate possession of the property, is an estate in possession. An estate, in which the right of possession is postponed to a future time, is an estate in expectancy.

"Sec. 36.¹ Enumeration of estates in expectancy. All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into:

1. *Future estates*; and
2. *Reversions*.

"Sec. 37.² Definition of future estates. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

"Sec. 38.³ Definition of remainder. Where a *future estate* is dependent on a precedent estate, it may be termed a *remainder*, and may be created and transferred by that name.

"Sec. 53.⁴ Conditional limitations. A *remainder* may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a *conditional limitation*."

¹ Real Property Law, 1896, §26. See index, page 9.

² Real Property Law, 1896, §27. See index, page 9.

³ Real Property Law, 1896, §28. See index, page 9.

⁴ Real Property Law, 1896, §43. See index, page 9.

In other words the Real Property Law provides in Section 35 that estates shall be divided into estates in possession and estates in expectancy. In Section 36 it provides that one kind of estate in expectancy is a future estate. In Section 38 that one kind of a future estate is a remainder, and in Section 53 that one kind of a remainder is a conditional limitation. We have heretofore shown in Point Two that the bequest to Francis J. Palmer of the principal of the trust fund

"whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund,"

was a *conditional limitation*. From the foregoing citations of the Real Property Law of the State of New York, it definitely appears that a conditional limitation is an *expectant estate*.

The foregoing provisions of the statute governing interests in real property are by express provisions of the New York Personal Property Law made applicable to personal property.

"Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property."

Personal Property Law, Section 11.
(Personal Property Law, 189) Section 2.

Therefore the assumption by the Court of Appeals of the State of New York, in the case at bar that

"the testator bequeathed to his son a *future contingent interest* in the principal of the trust fund,"

was the only conclusion justified by the statutes and the decisions of the State of New York.

POINT FOUR.

The bankrupt's interest in and to the principal of the trust fund was assignable.

A.

The will of Charles Palmer gave to the defendant Francis J. Palmer two rights in the bequest of \$50,000 in money; first, the right to income prior to the happening of the contingency, and, second, the right to the principal after the happening of the contingency. The only right, however, claimed by the plaintiff in this action is the second, to wit, the right of said Francis to the principal. The New York Court of Appeals correctly assumed that this right to principal was assignable and could have made no other assumption because ALL EXPECTANT ESTATES IN NEW YORK WHETHER IN REAL OR PERSONAL PROPERTY AND WHETHER LEGAL OR EQUITABLE (EXCEPT AS TO INCOME) ARE ASSIGNABLE:

ONE, BY STATUTE.

TWO, BY DECISION.

3
5

One. The statutes of New York clearly make assignable all expectant estates, whether in real or personal property and whether legal or equitable (except as to the income).

The Real Property Law of the State of New York expressly provides that all expectant estates are assignable.

"Section 59. Qualities of expectant estates. An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession."

Section 59, Real Property Law, New York.¹

The only limitation upon the assignability of a trust of real property affects a trust of income.

"What trust interest may be alienated. 1. The right of a beneficiary of an express trust to receive *rents and profits* of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise, *but the right and interest of the beneficiary of any other trust in real property may be transferred.*"

Real Property Law of the State of New York, Section 103.²

Similarly in respect to personality the only interest in a trust therein which cannot be assigned is a trust of income.

¹ Real Property Law, 1896, §49.

² Real Property Law, 1896, §83.

"The right of the beneficiary to enforce the performance of a trust to receive the income of personal property and to apply it to the use of any person, cannot be transferred by assignment or otherwise. *But the right and interest of the beneficiary of any other trust in personal property may be transferred.*"

Personal Property Law of the State of New York, Section 15.¹

From the foregoing it would appear that the Court of Appeals of the State of New York, in the case at bar, was compelled by the Statutes of the State of New York to assume that

"that interest (the defendant Palmer's future contingent interest in the principal of the trust fund) was assignable."

Two. The New York decisions clearly make assignable all expectant estates, whether in real or personal property and whether legal or equitable (except as to income).

These statutes seem to make it clear that *any expectant estate*, legal or equitable, so far as the principal of the estate is concerned, whether in personal property or in real property under the law of New York, is assignable. If, however, there could have been any doubt on the subject all possibility of such doubt it is submitted was effectively removed by two recent decisions of the Court of Appeals.

¹ Personal Property Law, 1897, §3, as amended. See index, page 9.

National Park Bank vs. Billings, 144 App. Div., 536. Unanimously affirmed, 203 N. Y., 556.

Clowe vs. Seavey, 208 N. Y., 496.

In the Billings case, 144 App. Div., 536, the Appellate Division of the Supreme Court (whose opinion was adopted by the Court of Appeals) through Mr. Justice Miller, said:

"While there appears to be no controlling authority in this State on the point, it has been assumed by this Court in this and the Second Department that a future contingent interest in personal property is alienable, the same as a contingent remainder in real property. (See Stringer vs. Barker, 110 App. Div., 37; Co-halan vs. Parker, 138 *id.*, 849.) * * * At common law contingent interests were not alienable or assignable to strangers for the same reason that choses in action were not assignable, *i. e.*, to prevent maintenance; but they could be released to a party having an interest as that tended to diminish the sources of litigation. (See Miller vs. Emans, 19 N. Y., 384, 390.) Practically, however, such interests were assignable, for to get around the strict rule of law the doctrine of equitable estoppel was invoked. The peculiar condition of society which gave rise to the common law doctrine of maintenance no longer exists; wherefore that doctrine does not prevail in this State except as expressly preserved by statute (Thallhimer vs. Brinckerhoff, 3 Cow., 623, 643; Sedgwick vs. Stanton, 14 N. Y., 289, 293). Courts of law now recognize the as-

signability of choses in action, not because the common law has been changed by statute, but because it is progressive. The reason for the old rule having disappeared, the law courts followed the rule in equity to keep pace with the changed conditions of society and the needs of commerce (Welch vs. Mandeville, 14 U. S., 233; Mandeville vs. Welch, 18 *id.*, 277; Gibson vs. Cooke, 20 Pick., 15; Tuttle vs. Bebee, 8 Johns., 118).

"Of course a rule of real property might well survive the reason for it, wherefore the propriety of the statute (see Real Prop. Law, Sec. 59, originally 1 R. S., 725, Sec. 35; R. S., Pt. 2, Chap. 1, Tit. 2, Sec. 35). But independently of the statute the rule even in respect to real property would doubtless by this time have been the same both in law and in equity (see Wash. Real Prop. [6th Ed.] Sec. 1557, and cases cited in note). For what reason or upon what principal can it be said then that a future contingent interest in personal property is not assignable at law as well as in equity? Not because such right or interest does not exist, because we have seen that it is a present right, which cannot be defeated by the act of a third party, and which will ripen into an estate in enjoyment upon the happening of a contingency. If there is now any rule against the assignability of such an interest, it must exist as a remnant of an ancient rule adopted to prevent the oppression of the weak by the strong, when it was supposed that both did not have an equal chance in the courts of justice. * * *

And at page 545 Judge Miller, speaking for the Court, used the following language, which it is submitted is absolutely controlling on the case at bar:

"Of course such an interest will not fetch as much as one which is certain to vest in possession, but that is not a reason for denying to creditors the right to have their debtor's property interests applied to the payment of his debts, unless, indeed, the law is to be tender with those who do not pay their debts. The question is, has the appellant a property interest or a bare possibility unaccompanied by any interest. It seems to me both upon principle and authority, that he NOW HAS A RIGHT IN THE NATURE OF A PROPERTY INTEREST WHICH HE COULD ASSIGN WHICH WOULD PASS TO A TRUSTEE IN BANKRUPTCY and which can, therefore, be reached in such an action as this.

The Appellate Division in Oppenheimer vs. Billings, 145 App. Div., 914, followed its decision in National Park Bank vs. Billings.

Furthermore the New York Court of Appeals in Clowe vs. Seavey, 208 N. Y., 496, reiterated and re-established without any dissent the doctrine of National Park Bank vs. Billings, which it had affirmed in 203 N. Y., 556. Judge Miller, speaking for the Court, said at page 560:

"We do not consider it necessary to determine whether it (expectant estate) was vested or contingent because we are of the opinion that in either view it was alienable. It was de-

cided in *National Park Bank of N. Y. vs. Billings* (144 App. Div., 536; 203 N. Y., 556), that *future contingent interests in personal property were alienable*, the same as contingent remainders in real property, but it is argued that that case is distinguishable in that in this case the persons who are to take cannot be ascertained until the death of the life beneficiary. The writer did observe in that case that there was no uncertainty of the person, and it has been stated by text writers and often assumed by judges that contingent interests are mere possibilities and not alienable where there is uncertainty of the persons who are to take. That doctrine had its origin in conditions which no longer exist. It did not survive the adoption of the revised statutes, which divided expectant estates into (1) future estates, and (2) reversions; and provided that a future estate is contingent 'while the person to whom or the event on which it is limited to take effect remains uncertain,' and that '*an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession*' (R. S., Pt. 2, Ch. 1, Tit. 2, Secs. 9, 13 and 35; now Real Prop. Law [Cons. Law, Ch. 50], Sections 36, 40 and 59). Those provisions are plain and simple and leave no room for the refinements of the ancient common law."

In *Clark vs. Grosh*, 81 Misc., 407, a will left certain property to one Matteson contingent on his surviving his sister. It was held that Matteson's trustee in bankruptcy was entitled to this bequest. The Court saying at page 415:

"It accords with the progress of the age that *every right and interest may be assigned*. The defendant, Matteson, had a right which might or might not ripen into his possession. Reason and precedent at this time are to the effect that he may dispose of such right and that his assignee will get the benefit of whatever right might thereafter accrue to him (Matteson), but for the transfer of such right. That right may be called a possibility, a chance or by any other name, yet it is a property right and by virtue of the Bankruptcy Act, will pass to his trustee, and this whether such interest be called vested or contingent."

The decisions in National Park Bank vs. Billings, 203 N. Y., 556; in Clowe vs. Seavey, 208 N. Y., 496, and in Clark vs. Grosh, 81 Misc., 407, simply follow a long line of prior decisions in New York, among which are

Bergman vs. Lord, 194 N. Y., 70;
Williams vs. Thorn, 70 N. Y., 270 at 273;
Hallet vs. Thompson, 5 Paige, 583 at 586;
Degraw vs. Classon, 11 Paige, 136 at 140;
Clute vs. Bool, 8 Paige, 83,

which line of decisions is considered at length in Point Seven of this brief.

It is no wonder therefore in view of the express terms of the Real Property Law, and the Personal Property Law, and in view of the decisions of the Courts of New York, dating from 1836 to date, the Judge of the Court of Appeals of New York, who rendered the opinion in the case at bar said in reference to the interest now before this Court:

"I shall assume also that that interest was assignable under the authority of National Park Bank vs. Billings."

B.

THE FUTURE CONTINGENT INTEREST OF THE DEFENDANT PALMER WAS ASSIGNABLE.

Future contingent interests in and to the principal of a trust fund of personal property are, of course, governed by Section 15 of the Personal Property Law, and are therefore assignable.

The Court of Appeals of the State of New York, as heretofore shown, correctly assumed that the defendant Palmer had a future contingent interest in the principle of personal property (see Points Two and Three, supra) and as shown in this point every future contingent interest in the principal of a trust of personal property is by statute and decision assignable.

Section 15, Personal Property Law.¹

National Park Bank vs. Billings, 144 App.

Div., 536; affirmed in 203 N. Y., 556.

Clowe vs. Seavey, 208 N. Y., 496.

Clark vs. Grosch, 81 Misc., 407.

Oppenheimer vs. Billings, 145 App. Div., 914.

There can be no doubt that in New York all expectant estates are assignable and that the rights of beneficiaries of all trusts of principal are assignable, and therefore the interest in the case at bar was assignable.

¹ Personal Property Law, 1897, §2. See index, page 9.

The question before this Court is simply whether an assignable right necessarily passes to the trustee in bankruptcy.

UP TO THIS POINT THE NEW YORK COURT OF APPEALS, THE HIGHEST COURT OF THE STATE OF NEW YORK SEEMS TO HAVE FOUND IN FAVOR OF PLAINTIFF-IN-ERROR IN ITS OPINION:

"I shall assume that the testator bequeathed to his son a *future contingent interest* in the principal of the trust fund (Points Two and Three of this brief) and that the trustee had no discretion but to pay it over, when the condition upon which the trust was limited, was fulfilled (Point One of this brief), and I shall assume, also that that interest was *assignable* under the authority of National Park Bank vs. Billings (203 N. Y., 556) (Point Four of this Brief)" (Record, page 43).

The difference between the New York Court of Appeals and counsel for the plaintiff-in-error, is clearly shown by the very next sentence in the opinion of that Court, when it says:

"It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors" (Record, page 43).

Counsel for the plaintiff-in-error claims that *every interest assignable by the bankrupt prior to filing his petition, unless exempt by a state statute, necessarily vests in the trustee in bankruptcy.* The opinion of the Court of Appeals has

therefore brought this case down to this very simple question, which of course, is dependent entirely upon the construction to be given to Section 70a5 of the Bankruptcy Act.

POINT FIVE.

A trustee in bankruptcy necessarily takes all property which prior to the filing of the petition in bankruptcy, the bankrupt could by any means have transferred.

Section 70 of the Bankruptcy Act reads as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt * * * to all * * * property which prior to the filing of the petition he (the bankrupt), could by any means have transferred or which might have been levied upon and sold under judicial process against him."

This section of the Bankruptcy Act, it is submitted, clearly provides that whatever could have been transferred by the bankrupt passes to his trustee. Under Points Two, Three and Four of this brief, it has been plainly shown that the interest of the bankrupt in and to the principal of the trust fund of \$50,000 (as distinguished from the trust of the income), could have been transferred. Furthermore the highest Court of the State of New York correctly assumed

"that the testator bequeathed to his son a *future contingent interest* in the principal of the trust fund * * * * and also that that interest was *assignable*" (Record, page 43).

It would therefore seem to follow that this interest vested in the plaintiff in error, as the trustee of the bankrupt. That certainly seems to be the clear effect of Section 70 of the Bankruptcy Act, but instead of making this holding the Court of Appeals says

"It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors" (Record, page 43).

And holds that this future contingent interest in the principal of the trust fund bequeathed by the testator to his son did not vest in the son's trustee in bankruptcy, because such was not the intention of the testator. But this is contrary to the wording of Section 70. Section 70, provides that whatever is transferable by the bankrupt vests in his trustee. It says nothing at all about the intention of any testator or creator of a trust. It does not say that the trustee of a bankrupt shall be vested by operation of law with the title of the bankrupt to all property which prior to the filing of the petition, he, the bankrupt, could by any means have transferred, except where a contrary intention has been manifested by the creator of the trust. It simply says that the trustee in bankruptcy shall be vested with the title to **all** property which the bankrupt could by any means have transferred.

In other words if Section 70a5 of the Bankruptcy Act means what it says, the plaintiff-in-error is

right in his contention, and the future contingent interest in the principal of the trust fund which the New York Court of Appeals correctly assumed the testator bequeathed to his son, passed to the plaintiff-in-error, and the judgment must necessarily be reversed.

On the other hand, the decision of the Court of Appeals of New York can only be supported on the theory that Section 70a5 of the Bankruptcy Act does not mean what it says, but should read as if in addition to the words that were actually in this section as and when it was enacted by Congress are added after the word "transferred" the words

"except where the creator of a trust has manifested a contrary intention."

Obviously (A) this contention is not binding upon this Court; and (B) this contention is not supported by the authorities.

A.

THE CONSTRUCTION OF SECTION 70A5 BY THE STATE COURT IS NOT BINDING ON THIS COURT.

No construction of a Federal Statute by any State Court is binding on this Court.

Furthermore the decision of the New York Court of Appeals was based not upon the construction of a state statute, but upon a proposition of general law. On such a proposition this Court has already said it would exercise its own judgment.

"To sustain the claim of exemption under the state law, and therefore under the bank-

rupt act, appellant relies upon the decisions of the Supreme Court of the State of Pennsylvania. If those decisions are interpretations of the state statute, we must yield to their authority. If they are declarations of general law—mere definitions of property—we may dispute their conclusions, if their reasoning does not persuade."

Page vs. Edmunds, 187 U. S., 596, at page 602.

B.

THE CONSTRUCTION OF §70A5 MADE BY THE NEW YORK COURT OF APPEALS IS CONTRARY TO THE AUTHORITIES.

Section 70a5 of the Bankruptcy Act provides that the trustee takes all property which the bankrupt could have transferred and means what it says.

"The trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey."

Page vs. Edmunds, 187 U. S., 596.

"But the policies were in their nature assignable and while failure to obtain the written consent of the insurers might defeat the policies it would not render their transfer invalid. Hewins vs. Baker, 161 Mass., 320. Therefore they were property which prior to the filing of the petition the bankrupt could

have transferred, and so were a kind of property enumerated in Sec. 70 of the Bankruptcy Act as vested by operation of the law in the trustee upon his appointment and qualification."

Fuller vs. New York Fire Ins. Co., 184 Mass., 12, at page 15.

"Under Section 70a (5) of the Bankruptcy Act (Comp. St., 1913, Sec. 9654) all property, which prior to the filing of the petition he (the bankrupt) could by any means have transferred passes to the trustee. As stated in Re Wright, 157 Fed., 544, 85 C. C. A., 206, 18 L. R. A. (N. S.), 193; 'If they are property which can by any means be transferred, the creditors of the bankrupt are entitled to the benefit of them, however little they may bring. Marketability and assignability are quite distinct.'

Pollock vs. Meyer Bros. Drug Co., 233 Fed. Rep., 861 (C. C. A. 8th Circ.) (being a case where the life tenant had the use of the income and such portions of the principal as were reasonably necessary for her support and maintenance).

"If they are property which can by any means be transferred, the creditors of the bankrupt are entitled to the benefit of them, however little they may bring. Marketability and assignability are quite distinct."

In re Wright, 157 Fed., 544 (C. C. A. 2nd Circ.).

"Under our law there can be no doubt that a bankrupt could transfer such an interest before his bankruptcy; and that being so, the conclusion is inevitable that it passes to the trustee under a bankruptcy act, which provides that all 'property' shall pass which the bankrupt 'could by any means have transferred.' "

Earle vs. Maxwell, 86 S. C., 1.

"It is well settled law that all kinds of property belonging to the bankrupt, save such as is exempt, which before the filing of the bankruptcy petition was capable of being transferred by the bankrupt, or being seized upon by creditors by judicial process and sold pass to the trustee in bankruptcy. The title vests in the trustee at the time of his appointment and qualification by operation of law."

Patterson vs. Boyd, 150 W. Rep., 424
(Sup. Ct. Tenn.).

Re Dorgan's Estate, 237 Fed. Rep., 507 (Advance sheets Feb. 1, 1917), it is submitted illustrates the principle contended for in the case at bar. In that case the will left certain property to the wife of the testator,

"For and during the period of her natural life, and give her full power to use the same without let or hindrance as she may see fit, giving and granting to my said wife, full power to sell and convey any real estate left by me, and to give proper deeds and conveyances for the same.

After the death of my wife, I hereby give, devise and bequeath to my nieces and nephews, as follows (naming them including the bankrupt), all of the proceeds of my estate."

The Court held the bankrupt's interest under this will went to the trustee in bankruptcy saying at page 509:

"There is no way of avoiding the conclusion that the interest of Edmund J. Dorgan, the bankrupt herein, in the estate of John Kelly, passes to the trustee in bankruptcy. Such interest is a property right—contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life. The trustee, or the purchaser from him, simply stands in the shoes of the bankrupt, receiving something, or possibly nothing, ultimately."

These authorities clearly establish that the trustee in bankruptcy takes title to all property which the bankrupt prior to the filing of the petition could by any means have transferred. There is absolutely no authority to the contrary.

The decision of the New York Court of Appeals in the case at bar, is therefore contrary to the express words of a federal statute, and is not only without any authority to support it, but is contrary to all of the authority on the subject.

POINT SIX.

The right of the bankrupt to the principal of the trust fund passed to the trustee, notwithstanding the fact that the bankrupt's right to possession was dependent upon a contingency.

At the time of filing the petition, the right of the bankrupt to the principal of the trust fund in question, was a right to its possession when he should become

"financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund"

(Record, page 6), or in other words, the bankrupt at the time of filing the petition in bankruptcy had a right to the possession of the principal of the trust fund on the happening of a contingency. This contingency might or might not happen. Nevertheless the right to the possession of this money, if the contingency should happen was a property right, which the bankrupt could have sold, assigned or transferred, and therefore passed to the trustee. The fact that the contingency might or might not happen did not in any way affect the right of the trustee to this particular piece of the bankrupt's property; it only affected the value thereof in the hands of the trustee. That is, the trustee, of course, could get a larger sum if he sold a positive right to the possession of this \$50,000 than he could get on the sale of a right to the same fund dependent upon the happening of a contingency. In other words this contingency affected the value of the trustee's estate, but not

the estate itself, its marketability not its assignability and, therefore did not in any way affect the vesting in the trustee in bankruptcy of whatever title, right, claim or interest the bankrupt had in and to the principal of this trust fund.

A right to possess or enjoy property dependent upon a contingency passes to the trustee in bankruptcy.

Such is the law as laid down by this Court when in deciding that a stock exchange seat which could be transferred only on the consent of the stock exchange passed to a trustee in bankruptcy this Court said :

"The bankrupt act of 1898 has made its own rule. For the same reason it is not necessary to review the cases cited from other jurisdictions. Whatever is in them favorable to appellants contention was based upon the inability that the respective courts found in the law to transfer a title which could be insisted upon and enjoyed against the consent of the association. But that consequence in our judgment, affects the value of a seat in a stock board, not its existence as property. The contingencies which may defeat or affect its title, or its enjoyment will be reflected in its price."

Page vs. Edmunds, 187 U. S., 596.

Sparhawk vs. Yerkes, 142 U. S., 1.

Hyde vs. Woods, 94 U. S., 523.

Such is the law of New York.

In **Clowe vs. Seavey, 208 N. Y., 496**, the interest before the Court was dependent upon the bank-

rupt surviving her father (208 N. Y., 500). The Court of Appeals held that this interest contingent though it was assumed to be, passed to the trustee in bankruptcy. This seems to be a direct adjudication of this point.

In *National Park Bank vs. Billings*, 144 App. Div., 536, the right before the Court was dependent upon the contingency of the bankrupt surviving the widow of the testator (144 App. Div., 545). Nevertheless the opinion of the Court at page 545 on this point is as follows:

"It seems to me both upon principle and authority that he now has a right in the nature of a property interest, which he could assign, which would pass to a trustee in bankruptcy and which can therefore be reached in such an action as this."

The above case was unanimously affirmed by the Court of Appeals on this opinion in 203 N. Y. at page 556.

And in *Tuck vs. Knapp*, 42 Misc., 140, the bankrupt was entitled to the principal of the trust fund after he should have satisfied such judgments as existed against him at the time of the death of the testator, the Court said at page 144:

"The plaintiff in this action is the trustee in bankruptcy of Charles W. Knapp. By virtue of his appointment, in him became vested all the property rights which the latter acquired under the will of John O. Knapp. Among other things he has acquired * * * the right to the principal of such trust when

the judgments against Charles W. Knapp are satisfied."

In Clark vs. Grosh, 81 Misc., 407, at page 414, the right of the bankrupt was dependent upon his surviving his sister. In a suit by the trustee in bankruptcy the Court said as follows:

"Recent decisions of the Courts uphold the assignment and the alienability of such a contingent expectant estate as was held by the defendant Matteson at the time of the filing of the petition against him in bankruptcy. In National Park Bank vs. Billings, 144 App. Div., 536; affd., 203 N. Y., 556, a will created a trust in personal property during the life of testator's wife, and upon her death the trustee was to divide the property equally and pay it to his son and daughter if they were then living. It was held that this was the gift of a contingent future interest to the son and alienable, and could be reached by a judgment creditor of the son. It was pointed out by the learned judge writing the opinion that the same rule prevails with reference to a contingent remainder in realty. Moore vs. Littel, 41 N. Y., 66; Dodge vs. Stevens, 105 id., 585, 588; Green vs. Head, 54 App. Div., 454, 457; Ham vs. Van Orden, 84 N. Y., 257; New York Life Ins. Co. vs. Cary, 191 id., 33, 41; Matter of St. John, 5 Am. Bank Rep., 190, are authorities sustaining the assignability of such an interest whether in real or personal property. It accords with the progress of the age that every right and interest may be assigned. The defendant Matteson had a right which might or might not ripen into his pos-

session. Reason and precedent at this time are to the effect that he may dispose of such right and that his assignee will get the benefit of whatever right might thereafter accrue to him (Matteson) but for the transfer of such right. That right may be called a possibility, a chance, or by any other name, yet it is a property right and, by virtue of the Bankruptcy Act, will pass to his trustee, and this whether such interest be called vested or contingent."

Such, too, is the general law on the subject. So a Trustee in Bankruptcy was held to acquire the right of an entryman, described as follows:

"The entryman is not vested with the title to be sure, but he is vested with the right to acquire the title by complying with the prescribed conditions."

Re Evans, 235 Fed. Rep., 956, at 959.

"Thus it has been held that a seat on the stock exchange, which can only be transferred with the consent of the officers of the exchange, will pass to the trustee, if it has a value. Page vs. Edmunds, 187 U. S., 596. A liquor license, if of any value and transferable, although it requires the consent of some official board will pass to the trustee. Fisher vs. Cushman, 103 Fed., 860. Life Insurance policies payable to some other person, but with the right of the bankrupt to change the beneficiary and endowment or tontine policies payable to the bankrupt, if living when it matures,

but in case of his death to some member of his family, have all been held to pass to the trustee of the bankrupt. In Re Coleman, 136 Fed., 818; In Re White, 174 Fed., 333; In Re Orear, 178 Fed., 632."

Pollock vs. Meyer Bros. Drug Co., 233 Fed. Rep., 861 (C. C. A., 8th Circ.).

In Equitable Life Assurance Society vs. Miller, 185 Fed., 98, there was a policy of life insurance which provided that on the surrender of the policy within six months of lapse, the Society would give the assured the choice of either a cash value or a non-participating, paid-up life policy. The bankruptcy took place while the policy was in force. Nevertheless, the Circuit Court of Appeals for the 8th Circuit held that the Trustee in Bankruptcy was entitled to this policy.

The Circuit Court of Appeals for the 2nd Circuit took equally strong ground when it said in Re Wright, 157 Fed., 544, at page 546:

"It is possible that, if the interests under the contract are transferred to the trustee, the insurance company may defeat the object of the transfer by withholding its consent. It does not appear that it has refused its consent, and there is no presumption that it will do so; but the fact that the interest is defeasible does not prevent its transfer. Defeasible and contingent interests of this nature are assignable. In Re Becker (D. C.), 98 Fed., 407; Fortunato vs. Pattern, 147 N. Y., 277.

"It is possible that the bankrupt might cause the forfeiture of the renewal interests by

leaving the employment of the company. These contingencies might render the interest to be transferred to the trustee of little value; but they would not render such interest unassignable. Therefore, without examining further the objections to the transfer, we may say that all of them relate to the marketability of the interest in question, rather than the transferability, and have no direct bearing upon the question certified.

"The fact that the possession of the estate depends upon a future contingency which may never happen, although it lessens materially the value of the estate, does not destroy its character as a vested interest which passed to the trustee."

Re St. John, 105 Fed., 234.

In the following cases the courts have held stock exchange seats, which are transferable only with the consent of the stock exchange, passed to the Trustee in Bankruptcy.

Page vs. Edmunds, supra.

Hyde vs. Woods, supra.

Sparhawk vs. Yerkes, supra.

Re Warder, 10 Fed., 275.

Re Hurlburt, Hatch & Co., 135 Fed., 504
(C. C. A., 2nd Circuit).

In the following cases the courts have held that liquor licenses which are transferable only with the consent of governmental authorities passed to the Trustee in Bankruptcy.

- Re Becker*, 98 Fed., 407.
Fisher vs. Cushman, 103 Fed., 860 (C. C. A., 1st Circuit).
Re Doyle, 209 Fed., 1 (C. C. A., 3rd Circuit).
Re Wiesel, 173 Fed., 718.
Re Brodbine, 93 Fed., 643.
Re Olewine, 125 Fed., 840.

In the following cases the courts have held contingent rights in insurance policies passed to the Trustee in Bankruptcy.

- Equitable Life vs. Miller*, 185 Fed., 98.
Re Schaefer, 189 Fed., 187.
Brigham vs. Home Life, 131 Mass., 319.
Re Wolff, 21 Am. Bankruptcy Reports, 452.
Re Herr, 182 Fed., 716.
Re White, 23 Am. Bankruptcy Rep., 90.
Re Hettling, 23 Am. Bankruptcy Rep., 101 (C. C. A., 2nd Circuit).
Re Orear, 24 Am. Bankruptcy Rep., 343. (C. C. A., 8th Circuit).

In the following cases the courts have held a market stall transferable only on the consent of the market authorities passed to the Trustee in Bankruptcy.

- In Re Gallagher*, 16 Blatchford, 410.
Re Emrich, 101 Fed., 231.

And in the following cases the courts have held that contingent contract rights passed to the Trustee in Bankruptcy.

Re Wright, 157 Fed., 544 (C. C. A., 2nd Circuit).

Re McAdam, 98 Fed., 409.

Therefore, it seems plain that the fact that the interest of the bankrupt was a contingent interest did not prevent it either under the law as laid down by this court, the courts of New York State or under the law as laid down by the courts generally from passing to the Trustee in Bankruptcy.

POINT SEVEN.

Any intention of the testator that this bequest should not go to creditors is contrary to law and public policy.

We have seen that the highest court of New York assumed that the testator bequeathed to his son (the defendant, Palmer) a future contingent interest in the principal of the trust fund and the trustee had no discretion but to pay it over when the condition upon which this trust was limited was fulfilled, and also that that interest was assignable under the authority of National Park Bank vs. Billings (203 N. Y., 556) (Record, page 43). And we would, therefore, expect the court under the authorities, cited in Points Five and Six of this brief, to take the next logical step and say, since this contingent interest in the principal of the trust fund was assignable, it necessarily passed to the Trustee in Bankruptcy, under the express provisions of Sec. 70a5 of the Bankruptcy Act. But instead of that, we find the court saying

that this *contingent interest* in the principal of the trust fund, *though assignable*, did not pass to the Trustee in Bankruptcy, because such was not the intention of the testator, the creator of the trust.

In other words, the court held the testator's intention powerful enough to override the plain language of the bankruptcy statute. No decision, State or Federal, has ever gone that far.

In other words, the intention of the testator, as construed by the courts of New York, was that the defendant, Palmer, should have the absolute ownership of this contingent right, should be able to realize on it by anticipation, by sale or by assignment, but that it should be kept away from his creditors; that while the defendant Palmer had an absolute property right in this contingent interest with which he could do as he pleased, his creditors could not reach this property right to apply on his just debts. It is a general principle that unless specifically authorized by legislative enactment, an individual cannot have the absolute right of property, and yet have this property withheld from his creditors. In the case at bar the defendant Palmer was to have *actual possession* of the fund when he was

"financially solvent and able to pay all his just debts and liabilities."

and we have seen that this contingent right to have this possession was an absolute right in him. During his lifetime nothing (except a voluntary or compulsory assignment) could happen which would deprive him of this contingent right other than the fruition thereof into actual possession.

It is this fact that either the contingent right or the actual possession always remained in the defendant Palmer during his life, that distinguishes this case from the class of cases represented by Nichols vs. Eaton, 91 U. S., 716, where the trust was to terminate on the bankruptcy or insolvency of the beneficiary. A testator, can, it is admitted, as in Nichols vs. Eaton, leave a bequest to a beneficiary until the beneficiary becomes insolvent or bankrupt, but he cannot leave a bequest to the beneficiary that survives bankruptcy and insolvency, as in the case at bar, and still have this bequest withheld from the creditors of the beneficiary, no matter how clear his intention may be.

"The general object of the testator seems to have been to give the devisee an absolute ownership of the land and yet to shield it from the payment of his debts. This is simply impossible. The law makes what a man owns, whether held by legal or equitable title, liable to the payment of his debts, unless it be property specifically exempted. No legal acumen or skill can evade this policy of the law, and as often as it is attempted, it must result in one of two things—either in the devisee taking nothing by the will or *in leaving what he does take liable for the payment of his debts.* The liability attaches to the ownership and it is beyond the power of any draftsman to invent a form of devise or conveyance that shall separate them."

Re Shenberger, 102 Fed. Rep., 978. Quoted with approval from Hoff & Smith, 156 N. Y. State, 419.

And the New York Courts have repeatedly held that a testator cannot withhold from the creditors of the beneficiary, property alienable by the beneficiary. They have always prior to this decision frustrated such an illegal intention.

"Neither law nor sound policy will allow an absolute or unconditional right to property to be vested in a person, which he may use and dispose of as he pleases, by anticipation or otherwise, but in relation to which property he may set his creditors at defiance." (Palmer vs. Hallock, 94 App. Div., 485; Hallett vs. Thompson, 5 Paige, 583)."

Bergman vs. Lord, 194 N. Y., 70.

"In Hallett vs. Thompson (*supra* 587) it is said: 'It is very obvious from the terms in which the bequest was made, that the object of the testatrix was not to secure to the legatee a support and maintenance out of the interest, or income, of a trust fund, which should be inalienable by the cestui que trust, in analogy to the provision before referred to in relation to a similar trust to receive the rents of real estate for the same object. On the contrary, it was an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights of creditors are concerned. *This cannot be done, consistently with public policy, or the settled rules of law.*' Hence I conclude

that the property in question belonged to the beneficiary and was liable for his debts."

Ullman vs. Cameron, 92 App. Div., 91 at page 95.

This was affirmed by the Court of Appeals in 186 N. Y., 339, at 345 in an opinion, in which the Court said:

"The intention of the testatrix, as we glean it from the will was to give the property to her husband and yet keep it from his creditors. The trust was an obvious pretext for that purpose. * * *

In Hallett vs. Thompson, Chancellor Walworth declared that it was 'contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors.' That case was cited and the language of the chancellor substantially quoted with approval by Judge Rapallo in Williams vs. Thorn (70 N. Y., 270, 273), and it has received the approval of many courts in this state and elsewhere.

The doctrine is sound and applies to this case."

"There is no question here of the suspension of the ownership of the fund for any particular period by way of limitation or condition, as it is perfectly obvious that the design of the person creating the trust was that the fund itself should all be paid to the cestui que trust or for his benefit during his life. It has no

analogy to a case where a fund is created and the income of the fund only is to be paid by the trustee to the cestui que trust, the ownership of the fund in the meantime being suspended.

In such case the beneficial interest of the cestui que trust is in the income, and not in the fund, and he has no power to alienate or charge the fund. But here the beneficial interest is in the fund itself, and the only limitation upon the right of the cestui que trust is the discretion of the trustee as to the amount to be paid from time to time, and the manner of expending the fund for the benefit of such beneficiary.

Such an interest has always been held to be assignable by the cestui que trust, and to *pass to assignees under bankrupt and insolvent acts and liable to be reached by a creditor's bill* (Bryan vs. Knickerbocker, 1 Barb. Ch., 409, Degraw vs. Clason, 11 Paige, 136, Hallet vs. Thompson, 5 id., 583). * * * The incidents of property are inseparable from the beneficial interest of the cestui que trust in the fund in the plaintiff's hands, and the fund must be held to have passed to the plaintiff upon his appointment as receiver of the property and credits of Joshua M. Bidlock.

Havens Receiver vs. Healy, 15 Barb., 296.

"In Hallett vs. Thompson (5 Paige, 586), it is observed by the Chancellor that as a general rule it is contrary to sound policy to permit a person to have the ownership of property for

his own purposes and to be able at the same time to keep it from his creditors."

Williams vs. Thorn, 70 N. Y., 270.

"It is a well-settled rule of equity that 'where the defendant himself has a right to sell his interest in the trust fund, in anticipation, and to use the proceeds of such sale as he pleases, equity requires that he should appropriate it to the payment of his honest debts; and he must assign such interest to the receiver in a creditor's suit. The owner of real or personal estate may create an interest in the rents and profits, or the income thereof, under the provisions of the Revised Statutes, in trust for the use or benefit of a third person, whom, from improvidence or otherwise, the donor does not think proper to entrust with the absolute disposition and control of his beneficial interest, in the trust property, by anticipation. But neither law nor sound policy will allow an absolute and unconditional right to property to be vested in a person, which he may use and dispose of as he pleases, by anticipation or otherwise, but in relation to which property he may set his creditors at defiance, by means of a mere nominal trust.' (Degraw vs. Clason, 11 Paige, 136, 140. See also, Hallett vs. Thompson, 5 id., 583; Wetmore vs. Trustlow, 51 N. Y., 338, 342.)

Palmer vs. Hallock, 94 App. Div., 485, at 488.

Section 103 of the New York Real Property Law, and section 15 of the New York Personal Property

Law provide that every trust interest except as to income is assignable.

Sec. 70A5 of the bankruptcy act provides that whatever is assignable passes to the trustee in bankruptcy.

What of it, if the testator left a trust interest, which he did not intend his son's creditors to get?

Such an intention is contrary to positive law and therefore ineffective.

"The intention of the testatrix, as we glean it from the Will, was to give the property to her husband and yet keep it from his creditors * * * As to creditors, however, the trust cannot stand, for it is opposed to public policy as declared by statute and by the decisions of the Courts. (1 R. S., 727; Real Property Law, Secs. 71, 72, 73 and 129; Hallett vs. Thompson, 5 Paige, 583; Frazer vs. Western, 1 Barb. Ch., 220; Wendt vs. Walsh, *supra*, Chaplin on Trusts, 585.)"

Ullman vs. Cameron, 186 N. Y., 339, 345.

"The cardinal rule in the construction and interpretation of wills or codicils is that the intention of the testator must be ascertained if possible, and *if it is not in contravention of some established rule of law or public policy must be given effect * * * but it cannot be construed so as to effectuate an intention which is contrary to some rule of law or public policy.*" Citing authorities.

40 Cyc., pages 1386-1388.

30 Am. Eng. Enc., 2d ed., page 61.

Finly vs. King, 3 Pet. 346, 377.

LePage vs. McNamara, 5 Ia., 124, 144.

This decision of the New York Court of Appeals, that Palmer's contingent interest though assignable did not pass to his Trustee in bankruptcy because such was not the intention of the testator, is in effect a *decision that an act of Congress providing that whatever is assignable passes to a trustee in bankruptcy, may be overruled by the intention of the testator.*

The mere statement of this conclusion would seem to prove its fallacy. That this decision, that a positive statute is overruled by the intention of a testator, is erroneous has been clearly shown by the authorities heretofore cited in this point. All the common law Courts including the Courts of New York have uniformly held until the decision now before this Court for a review that when a testator's intention conflicts with a positive statute, intention must fail. A few of the numerous cases in which the New York Courts have applied this doctrine are as follows:

First, the intention of a testator fails where the beneficiary is too indefinite for the bequest to be enforced by a Court of Chancery.

Tilden vs. Green, 130 N. Y., 29.

Second, a bequest to a university fails, which gives to it property in excess of what its charter powers allow it to hold, no matter how clear the intention may be.

Matter of McGraw, 111 N. Y., 66.

Third, the intention of the testator fails, when the period of suspension of alienation is not

measured as the statute requires or is in excess of the period that the statute allows.

- Hawley vs. James, 16 Wend., 61.
- ~~Underwood~~ vs. Curtis, 127 N. Y., 523.
- Brown vs. Quintard, 177 N. Y., 75.
- Kalish vs. Kalish, 166 N. Y., 368.
- Haynes vs. Sherman, 117 N. Y., 433.
- Cruikshank vs. Home for the Friendless, 113 N. Y., 337.
- Cottman vs. Grace et al., 112 N. Y., 299.
- Adams vs. Perry, 43 N. Y., 488.

Fourth, the intention of the testator fails where he directs an accumulation of income, except for a minor.

- Kalish vs. Kalish, 166 N. Y., 368.
- Hascall vs. King, 162 N. Y., 134.
- Killam vs. Allen, 52 Barb., 605.
- Wells vs. Wells, 30 Abb. N. C., 225.
- Dodsworth vs. Dam, 38 Misc., 684.
- Cowen vs. Renaldo, 82 Hun, 479.

A.

IN EATON vs. BOSTON SAFE DEPOSIT & TRUST COMPANY, 240 U. S., 427, THIS COURT EXPRESSLY LEFT OPEN THE QUESTION NOW RAISED.

In the recent case of Eaton vs. Boston Safe Deposit & Trust Company, 240 U. S., 427, this Court was extremely careful not to decide the question now at bar. In the Eaton case, a bequest of income was left to the bankrupt

"during her life, said income to be free from the interference or control of her creditors."

The highest court of Massachusetts held that such a bequest was assignable in Massachusetts. This Court, however, in its opinion said:

"If it be true without qualification that the bankrupt could have assigned her interest and by so doing could have freed from the trust both the fund and any proceeds received by her, *the argument would be very strong that the statute intended the fund to pass.*

* * * There would be difficulty in admitting that a person could have property over which he would exercise all the powers of ownership except to make it liable for his debts. The conclusion that the fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held, that an executor was not liable on his bond for paying over the annuity to an assignee as it fell due when the assignor to whom it was bequeathed free from creditors had not attempted to avoid his act. Ames vs. Clarke, 106 Mass., 573. The other case does not go beyond a dictum that carries the principle no farther. Huntress vs. Allen, 195 Mass., 226. It is true that where the restriction has been enforced there generally has been a clause against anticipation, but the present decision in following them holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point in-

consistent with the dominant intent of the will. *Whether if that power were absolute, the restriction still should be upheld as in case of a statutory exemption, that leaves the bankrupt free to convey his rights it is unnecessary to decide.*

This Court therefore in the Eaton case held that it was unnecessary to decide that if the power of alienation of property were absolute, the restriction would still be upheld.

But in the case at bar as has heretofore been established, the New York Court of Appeals correctly assumed that the power to alienate the future contingent interest involved here was absolute (record, page 43), and its conclusion is not open to criticism as was the similar conclusion in the Eaton case of the Supreme Judicial Court of Massachusetts because:

First, Section 15¹ of the Personal Property Law of the State of New York, makes the rights of every beneficiary in a trust of personal property—except of income—is assignable, and

Second, Bergman vs. Lord, 194 N. Y., 70; Williams vs. Thorn, 70 N. Y., 270; Hallett vs. Thompson, 5 Paige, 583; Degraw vs. Clason, 11 Paige, 136; Palmer vs. Hallett, 94 App. Div., 485, hold that this statute means just what it says, to wit, that the only right of a beneficiary of a trust which is not assignable, is a right to income.

Third, In National Park Bank vs. Billings, 203 N. Y., 556, and Clowe vs. Seavey, 208 N. Y., 496, the Court of Appeals of the State of New York, held that these statutes apply with full force to future contingent interests in personal property.

¹ See index, page 9.

Therefore these decisions and these statutes do require this Court to confirm the assumption of the Court of Appeals of the State of New York that the *future contingent interest* now before this Court was absolutely assignable.

Therefore it is submitted that this Court has now before it the very question which in the Eaton case it said it was unnecessary to decide. And that here it is necessary to decide whether, when the power of alienation of the property is absolute, a restriction, that property shall not go to creditors, will be upheld, or whether the Court will follow a plain and simple enactment of Congress that the trustee in bankruptcy takes title to

"all * * * property which prior to the filing of the petition he (the bankrupt) could by any means have transferred."

B.

THE EATON CASE IS TO BE FURTHER DISTINGUISHED BECAUSE IT WAS A "SPENDTHRIFT TRUST" CASE PURE AND SIMPLE.

The interest before the Court in the Eaton case was a life interest in income which by the repeated decisions of the Massachusetts Courts had been held to be free from the claims of creditors. It was an illustration of the long established "spendthrift trust," of income has generally been sustained not only by the Courts of Massachusetts and by this Court, but by the Courts throughout the United States generally.

"The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. Dunn vs. Dobson, 198 Mass., 142, 146, Lathrop vs. Merril, 207 Mass., 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this Court to weigh the reasoning upon which it has been established by the Massachusetts cases, Page vs. Edmunds, 187 U. S., 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this Court to be overthrown here. Nichols vs. Eaton, 91 U. S., 716. Shelton vs. King, 229 U. S., 90, 99."

Eaton vs. Boston Safe Deposit & Trust Co., 240 U. S., 427.

In the case at bar, however, the interest before the Court is an interest in principal. Unlike "spendthrift" trusts of income it has always been held that principal cannot be given to an individual and withheld from his creditors. No Court has ever yet said that the interest of a person in a trust of principal could continue after bankruptcy or insolvency, and yet that interest could be withheld from creditors. The New York Court of Appeals cited no authority for this startling innovation. The defendants-in-error have cited no authority for this startling innovation. It is submitted that if the case at bar is sustained by this Court a new and additional kind of spendthrift trust will be created and that the law will then for the first time know "spendthrift trusts" of principal as well as "spendthrift trusts" of income.

POINT EIGHT.

The plaintiff-in-error, the condition having happened, was entitled to the possession of the principal of the trust fund.

The plaintiff in error does not claim that on his appointment he was vested with the right to the immediate possession of the principal of the trust fund. What he does claim, however, is that on his appointment he was vested with the right that the bankrupt then had to receive said principal when and if the bankrupt should "become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund." And this condition having happened, and having been held to have happened by a court of competent jurisdiction in a proceeding in which both of the defendants were parties, then the plaintiff-in-error and not the bankrupt was entitled to receive said principal, since all the rights of the bankrupt in the principal of the fund had passed to this plaintiff-in-error.

A.

THE PLAINTIFF IN ERROR HAVING BEEN VESTED WITH THE BANKRUPT'S CONTINGENT RIGHT WAS ENTITLED TO THE FRUIT THEREOF.

This would seem to be obvious. A has a right to receive property when a contingency happens. This right is transferred to B. The contingency

happens. Does it not seem clear that the property should then go to B and not to A?

Hammond vs. Whitredge, 204 U. S., 538, seems to be exactly in point on this proposition as well as the two following cases.

In Fuller, Trustee vs. N. Y. Fire Insurance Co., 184 Mass., 12, we have a case where the facts are as follows: On March 1st, one Callender filed a petition in bankruptcy. On March 10th at 12:30 o'clock P. M., a receiver of the bankrupt's estate was appointed and at 7:45 P. M. certain insured property belonging to the estate was destroyed by fire. The trustee in bankruptcy of the Callendar estate sued the fire insurance companies on account of this loss and the contention was set up that the proceeds of these policies was after acquired property which belonged to the bankrupt. The Supreme Court of Massachusetts disposed of this contention as follows:

"Hence the destruction of the property changed or ripened the conditional obligation of the insurers into a fixed obligation to pay the amount of indemnity stipulated for in the policy. To hold that this ripening of the obligation made it after acquired property which would not vest in the trustee, but which the bankrupt could hold as his own, would be as absurd as to hold that if goods which he had at the time of adjudication were converted by a stranger to his own use between the time of the adjudication and the appointment of the trustee the right to maintain trover for their value would not pass to the trustee, but might be enforced by the bankrupt as after acquired property.

If an unmatured obligation on which there was no right of action at the date of adjudication should mature between it and the appointment of the trustee the right of action upon it would be one which did not exist until after the adjudication, but there can be no doubt that it would vest in the trustee. In all such cases the new right of action may be compared to a fruit which has grown and ripened during the period of transfer and which being upon the branch at the moment when the property vests in the new owner becomes his. The statute is to be construed in view of its general purpose of applying the property and rights of debtors for the benefit of their creditors, and while the debtor's property vests as of the date of the adjudication it yet has the incidents which have become attached to it up to the time when it vests in the trustee upon his appointment and qualification."

Re Judson, 188 Fed., 702, was a case where a policy of life insurance was payable to the wife and children of the insured. One of the children went into bankruptcy and the insured died after the filing of petition. Judge Hough says on this point at page 705:

"Before reaching the query whether petitioner's interest was transferable there must be noticed a distinction sought to be drawn between the interest of the petitioner and the fruits of that interest, i. e., the moneys paid on the policy. No such distinction is tenable, for one who has an *interest in property, even though contingent, owns not only the contin-*

gency but everything that may flow therefrom.
He that owns a tree owns the fruit thereof.
 * * * The interest of the petitioner in the policies in question and the proceeds of that interest are in law the same thing unless the statute draws a distinction."

B.

THE CONDITION UPON WHICH POSSESSION OF THE TRUST FUND WAS LIMITED WAS SATISFIED.

Under the law of New York there can be no question that the condition of the will of Charles Palmer that "his son should become financially solvent and all to pay all his just debts" was satisfied. There are absolutely no authorities to the contrary. There are three direct authorities upholding this contention.

In *Young vs. Young*, 127 App. Div., 130, the condition was as follows:

"If however my said son William A., should at any time during his lifetime discharge all his debts and liabilities, and be in the judgment of my said Executors, entirely solvent, then, I authorize my said Executors to put an end to this trust by conveying to my said son William A., his heirs and assigns forever all the said one-fifth of my estate so held by the said Executors in trust, under this clause of my Will."

Said William A., was discharged in bankruptcy. The Court held that the said William A., after his

discharge in bankruptcy was entitled to the property saying:

"One is solvent who is able to pay his debts and liabilities, and in determining solvency, debts which had been discharged by bankruptcy proceedings, or upon which any remedy was barred by the Statute of Limitations could not be considered."

In Tuck vs. Knapp, 42 Misc., 140, the bequest was:

"to pay the balance of his estate to the said Charles W. Knapp at any time after he should have satisfied such judgments as existed against him at the time of the death of the testator."

The action was an action by the Trustee in bankruptcy of said Charles W. Knapp to secure possession of this property, which relief the Court granted saying:

"By virtue of his appointment, in him became vested all the property rights which the latter acquired under the will of John O. Knapp. Among other things he has acquired the right, from the date of his appointment, to all the income arising from the trust which the testator endeavored to create for the benefit of Charles W. Knapp, and the right to the principal of such trust when the judgments against Charles W. Knapp are satisfied. In case such judgments should not be satisfied before the death of Mr. Knapp, the trust prop-

erty would go to the children of the testator who might then be living.

But it has been proved in this case that by reason of his discharge in bankruptcy Mr. Knapp has been freed of all claims against him. That constitutes, I think, a satisfaction of the judgments, within the meaning of the will."

And in the accounting proceedings on this very will reported under the name of the "Matter of Farmers' Loan and Trust Company, as executor under the last will and testament of Charles Palmer, deceased," in 65 Misc., at 418, to which proceedings both of the defendants were parties (Record, page 8) the Surrogate first considers Young against Young, and then says:

"The reasoning which is applied to a case where the verbal requirement was that the son should do an affirmative act, viz., 'discharge his debts' loses nothing in application to the present case, where the duty of the trustee depends not upon the doing of any act by the son, but solely upon his attainment of a certain personal condition. If his present situation comes within the terms of the will, he is entitled to the fund, whether that situation has been achieved by his efforts or has happened to him.

That he is financially solvent must be confessed under the decision quoted. Associated with the term 'financially solvent' are the words 'able to pay his just debts,' etc. These two expressions are not at variance and were not introduced into the will to neutralize or endanger each other's meaning. The latter

member of the expression 'able to pay' when coupled with the words 'financially solvent,' is to be known by the company it keeps; and the ability to pay, which was in the testator's thought, must be construed to have been that sort of ability which consorts with and does not exceed or distort the meaning contained in the words 'financially solvent.'

Moreover, the son here concerned is able to pay his just debts, since there are none left which are legally enforceable. Whether 'just debts' include obligations formerly enforceable, but later made subject to defenses and no longer enforceable by law, has been determined in situations not unlike the case at bar. The common direction in a will that 'all just debts shall be paid,' or that testamentary dispositions shall take effect 'after the payment of just debts,' is held not to include debts once due, but now subject to the defense of the Statute of Limitations. *Martin vs. Gage*, 9 N. Y., 298; see also 4 Words & Phrases Judicially Defined, sub nom. ('Just Debts,' page 2902). The same rule is laid down with regard to debts directed to be paid to which the defense of infancy at the time of the making of the debt is available. *Smith vs. Mayo*, 9 Mass., 62; 6 Am. Dec., 28. Such a direction in a will is said not to avail a creditor who, holding an otherwise just debt, neglects the usual means of proving demands until after the estate is closed. *Collamore vs. Wilder*, 19 Kan., 67. Under a statute that upon assessment for taxation 'just debts' shall be deducted, it is said: 'the use of the term "just debts" in the statute plainly implies that legal,

valid and incontestable obligations must be shown in order to entitle the estate to the benefit of the statute.' People ex rel. Osgood vs. Commissioners, 99 N. Y., 154.

In the will under consideration, the testator directed that 'all his just debts be paid.' Is it conceivable that in the same instrument he used the same expression to mean two different things; first, when applied to his own debts, and secondly, when applied to the son's debts?

The beneficiary is able to pay all debts which are 'just' in law. Those which the law will not make him pay if he invokes a defense which the law has given him cannot be 'just.'

The conclusion is that, whether or not the executor accepts the certificate or written statement of the beneficiary, it is become one of the express conditions of its trust that the son shall have the principal of the trust fund, because he *has become 'financially solvent and able to pay all of his just' debts and liabilities from resources other than the principal of this fund.'*

C.

THE DEFENDANTS ARE ESTOPPED FROM CLAIMING THAT THE CONDITION HAS NOT BEEN SATISFIED.

In the accounting proceeding, supra, 65 Misc., 418, at 422, the Surrogate held:

"The conclusion is that, whether or not the executor accepts the certificate or written statement of the beneficiary, it is become one

of the express conditions of its trust that the son shall have the principal of the trust fund because he has become 'financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this fund.'

Under this decree the principal of this trust fund has been paid and delivered to the defendant Palmer (Record, pages 8 and 9). In other words, the defendants have received a benefit under the decree in the Surrogate's Court that the condition was satisfied, but now seek to set up the claim that the condition was not satisfied, which necessarily involves the conclusion that the Surrogate's decree was erroneous. Having secured all the benefit of this decree, they now seek in effect to impeach it. This Court, however, has already held that they cannot take this position, since it said in *Peters vs. Bain*, 133 U. S., 670 at 695:

"So in other words that one cannot take a benefit under an instrument and then repudiate it."

This is the established law in the case of wills.

"As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from at the same time attacking the validity of the very instrument under which he received the benefit.

In *Hyde vs. Baldwin*, 17 Pick., 303, 308, it was held that one who accepted the beneficial interest under a will was thereby barred from

setting up any claim which would defeat the full operation of the will. *Drake vs. Wild*, 70 Vermont, 52, holds the same doctrine. In that case a party was held to be estopped from asserting her title to a trust fund disposed of by the will, because she had accepted the provisions of the will in her own favor. In *Bronson vs. Watkins*, 96 Georgia, 54, it was held that one who took an estate under a will was thereby estopped from at the same time denying its validity as a will, or from questioning the jurisdiction of the Court admitting it to probate, or the regularity of the probate proceedings. In *Smith vs. Smith*, 14 Gray, 532, it was held that the acceptance of a devise estops the devisee to set up a title in opposition to the will, at law as well as in equity. In *Fry vs. Morrison*, 159 Illinois, 244, it was held that one who took a beneficial interest under a will was thereby estopped to set up any right or claim of his own, though otherwise well founded, which would bar or defeat the effect of any part of the will. And in *Madison vs. Larmon*, 170 Illinois, 65, 82 it was again held that one who takes under a will cannot contest it as an heir at law of the devised property. So, in *Fisher vs. Boyce*, 81 Maryland, 46, 53, the Court said: 'It is a maxim in a court of equity not to permit the same person to hold under and against a will. * * * It is equally appropriate to the jurisdiction and practice of courts of law. If the appellees claim under the will of their father, they must give it effect as far as they can, and they will then be estopped from denying its validity and genuineness. *Waters' Appeal*,

35 Pa. St., 523; Thrower vs. Wood, 53 Georgia, 458.' "

Utermehle vs. Norment, 197 U. S., 40, at 57, 58;

Chipman vs. Montgomery, 63 N. Y., 221, at 234;

Beets vs. Stoops, 186 N. Y., 456, at 464;

are in accord, and show that the law as laid down by this Court has also been laid down by the highest Court of the State of New York.

It is also well settled that a person who has taken a benefit under an unconstitutional law cannot set up the unconstitutionality of such law, even "in a subsequent litigation with others."

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. Ferguson vs. Landrom, 5 Bush. (Ky.), 238, see Ferguson vs. Landrom, id., 548; Von Hook vs. Whitlock, 26 Wend., N. Y., 43; Lee vs. Tilloston, 24 id., 337; The People vs. Murray 5 Hill, N. Y., 468; City of Burlington vs. Gilbert, 31 Iowa, 356; B. C. R. & M. R. R. Co. vs. Stewart, 39 id., 267."

Daniels vs. Tearney, 102 U. S., 415, at 421.

The same is true of contracts;

"A party who has secured to himself the benefit of a contract, and has accepted and used these benefits, has estopped himself in the courts from denying the validity or binding force of the instrument, or from setting up or asserting to the contrary (Dezell vs. Odell, 3 Hill, 216, 221; Thomas vs. Bell, Hill & Denio, by Lalor, 433, 434; Costar vs. Brush, 25 Wend., 628; Plumb vs. Cattaraugus County Mutual Insurance Co., 18 N. Y., 394; Welland Canal Company vs. Hatheway, 8 Wend., 483; Otis vs. Sell, 8 Barb., 102; Lawrence vs. Brown, 1 Seld., 395)."

Hathaway vs. Payne, 34 N. Y., 92, at 109,
and of judgments.

"But if the divorce decrees receive the same treatment as judgments or decrees in ordinary controversies relating to damages or property, petitioners action must fail; for one who accepts and retains the fruits of a void judgment cannot afterwards repudiate his action and take advantage of its invalidity. Water Co. vs. Middaugh, 12 Colo., 434, and cases cited. Duff vs. Wymcopp, 74 Pa. St., 300. The foregoing principle has numerous other salutary applications—as for instance, that one having accepted the benefits of an unconstitutional law, cannot, as a general rule rely upon such unconstitutionality as a defense, even though the invalidity has been adjudicated in another

suit. Daniels vs. Tearney, 102 U. S., 415, and cases."

Arthur vs. Israel, 15 Colo., 147, 152.

Peters vs. Bain, 133 U. S., 670, says that a person cannot take a benefit under an instrument and then repudiate it. Daniels vs. Tearney, 102 U. S., 415, holds that one who takes a benefit under an unconstitutional law cannot even in a litigation with others set up its unconstitutionality. It would seem necessarily to follow that one who has actually paid or received \$50,000 under a decree of court of competent jurisdiction cannot set up the invalidity of such decree.

D.

THAT THE CONDITION COULD NOT HAVE BEEN SATISFIED UNLESS THE BANKRUPT APPLIED FOR HIS DISCHARGE IN BANKRUPTCY IS IMMATERIAL.

Our opponents have claimed below that since the condition could not have been satisfied until the discharge in bankruptcy had been granted, and that said discharge could not be granted except on the application of the bankrupt, the plaintiff in error is not entitled to the fund in question. How this conclusion has been reached, counsel for the plaintiff in error is utterly unable to see. Grant that the discharge could not have been obtained unless defendant Palmer had applied for it, nevertheless he did apply for it and it was obtained. What difference does it make that he might not have applied for it, when he actually did do so?

Again the fact that actual possession of this fund could not have been obtained unless the bankrupt had applied for his discharge is immaterial, because where an act by the bankrupt is necessary before his trustee is entitled to property the bankruptcy Courts have time and time again compelled the bankrupt to perform said act. This was established as early as 1 Atkyns, 210, where in Ex Parte Butler, Lord Hardwick compelled the bankrupt who was the holder of an office in the City of London, to attend before the Lord Mayor and Court of Aldermen, and to surrender his office. And in Re Wiesel, 173 Fed. Rep., 718, the Court says:

"This license the receiver advertised and sold and it is the duty of the bankrupts to assist the receiver in securing a transfer to the purchaser, so far as they are able to render such assistance. Up to the time of their discharge they can be compelled, by summary order of court, to give the receiver any information they may possess, or render him any assistance they can in the transfer of possession of property belonging to the bankrupt estate."

And in Re Emrich, 101 Fed., 231, the Court said:

"And this Court is authorized to make such orders as may be necessary for the enforcement of the provisions of this act. It is clear it has power to order the bankrupt to transfer such license to the trustee and thus enable such trustee, or his vendee to secure the re-issue of the license by the city."

In all the following cases bankrupts were required to do some positive affirmative act in order to put the trustee into possession of property which the bankrupt could have prior to the filing of the petition transferred.

- Re Doyle, 209 Fed., 1 (C. C. A., 3rd Circ.),
In Re Wiesel, 173 Fed., 718.
Re Warder, 10 Fed., 275.
Re Hurlbutt Hatch & Co., 135 Fed., 504
(C. C. A., 2nd Circ.).
Re Gallagher, 16 Blatchf., 410.
Re Emrich, 101 Fed., 231.
Re Ketchum, 1 Fed., 840.
Fisher vs. Cushman, 103 Fed., 860.

E.

THE FARMERS' LOAN AND TRUST COMPANY HAVING KNOWLEDGE OF THE BANKRUPTCY AND OF THE DISCHARGE, IMPROPERLY PAID THE DEFENDANT PALMER AND IS THEREFORE LIABLE TO THE TRUSTEE.

The determination of the Surrogate's Court was that by his discharge in bankruptcy Francis J. Palmer had acquired a vested interest in the principal of the trust fund, and that the trust therein was terminated (Record, page 8). This conclusively gave the Farmers' Loan and Trust Company knowledge both of the bankruptcy and of the discharge.

But, nevertheless, the Farmers Loan & Trust Co. paid the principal of the trust fund to the defendant, Francis J. Palmer.

The payment, therefore, to the defendant Palmer, of the principal of the trust fund, was an improper payment (Re Lighthall, 221 Fed. Rep., 791, 795, see page 96 *infra*), and the defendant, Farmers Loan & Trust Company must pay the principal of the trust fund to this plaintiff, the person legally entitled thereto, to the extent that the defendant Palmer does not pay.

Payment to a person not entitled is not payment at all and this rule of law has been expressly applied to payment to a bankrupt of property which should have been paid to his trustee in bankruptcy.

Equitable Life Assurance Society vs. Miller, 185 Federal, 98 (C. C. A., 8th Cir.).

In that case, the bankrupt had a life insurance policy which had a cash surrender value. After the adjudication in bankruptcy, the bankrupt surrendered the policy to the insurance company and received a loan from the company. The Court expressly held that the loan to the bankrupt was an improper payment and that the trustee in bankruptcy was entitled to recover from the insurance company, the cash surrender value of the policy. The Court held:

"The insurance company was, therefore, aware at the time of making the loan that all of bankrupt's interest in the policy had passed to the trustee in bankruptcy. Under such state of facts, the policy being in the possession of the company, acquired by it wrongfully as to the trustee, it cannot insist upon the trustee making a surrender which he is prevented from doing by the act of the company and the trus-

tee was entitled to recover the cash surrender value thereof."

Under the authority of this case and under the general law, payment by the defendant, Farmers Loan & Trust Company to the defendant Palmer a person not entitled thereto is no protection to it, and the plaintiff is entitled to recover from the defendant in spite of that payment.

POINT NINE.

The authorities support the plaintiff's position.

ST. JOHN vs. DANN, 66 Conn., 401 and TUCK vs. KNAPP, 42 Misc., 140, ARE DIRECT AUTHORITIES IN FAVOR OF PLAINTIFF.

The plaintiff-in-error has shown that the interest of Francis J. Palmer in and to the principal of the trust fund of \$50,000 was a conditional limitation and that conditional limitations are transferable both under the statute and independent of the statute, and that whatever is transferable by the bankrupt passes to the trustee in bankruptcy. This reasoning seems so clear that one would naturally expect to find it supported by authorities and we do find two cases exactly in point.

In St. John vs. Dann, 66 Conn., 401, the will read as follows:

"The portion of my estate so hereinbefore given, devised and bequeathed to my son George L. Dann, is to be held by my executors,

whom I hereby appoint as trustees for that purpose. I give, devise and bequeath to them as such trustees and to the survivor of them, such portion—to be held by said trustees or the survivor of them in trust for the use and benefit of the said George L. Dann and his family *until the said George L. Dann shall discharge his present liabilities by payment, compromise or otherwise—when the said trustees are hereby authorized, empowered and directed to transfer and convey to the said George L. Dann all of such portion as shall then be remaining in their hands or possession or in the hands and possession of either of them.”*

Of this bequest the Court said on page 405:

“It follows that the ultimate and absolute title to a third part of the testator's residuary estate, including the remainder on the determination of the life estate given to his widow, became vested as soon as the will took effect, in George L. Dann in fee simple, subject only to the terms of the trust. He was adjudicated an insolvent debtor by the Probate Court for the District of Norwalk, in 1891, and *this title thereupon passed to his trustee in insolvency.*

“It does not appear upon the record whether George L. Dann has ever discharged what the testator described as ‘his present liabilities.’ * * * So long as any of the indebtedness which he described exists, and so long only, the possession of George's portion must remain in the trustee under the will. *Should such indebtedness be discharged, either by George L. Dann or the trustee in insolvency,*

the title of the latter to the fund would immediately become absolute."

It is submitted that the above case is on all fours with the case at bar.

In *Tuck vs. Knapp*, 42 Misc., 140, it was held that on the discharge of the bankrupt a trustee in bankruptcy was entitled to a fund similarly bequeathed.

In that case a trust estate was bequeathed to Charles W. Knapp after he should have satisfied such judgments as existed against him at the time of the death of the testator, subject to a life estate in the principal sum of two thousand dollars for the benefit of the testator's daughter.

The Court, Andrews, J., held :

"By this will the testator attempted to do two things. He first created a trust fund of \$2,000 for the benefit of his daughter Etta. Dependent upon this trust estate was a remainder to Charles, if he survived his sister, and before her death *had satisfied the judgments against him*. * * * The plaintiff in this action is the trustee in bankruptcy of Charles W. Knapp. By virtue of his appointment in him became vested all the property rights which the latter acquired under the will of John O. Knapp. Among other things he has acquired * * * the right to the principal of such trust when the judgments against Charles W. Knapp are satisfied. * * * But it has been proved in this case that by reason of his discharge in bankruptcy Mr. Knapp has been freed of all claims against him. That constitutes, I think, a satisfaction of the judgments, within the meaning of the will.

"The conditions being performed, the trustee in bankruptcy is entitled absolutely to the remainder of John O. Knapp's estate. After setting apart, therefor, the trust fund for his sister, as provided in the will, Charles W. Knapp must account to the trustee for any balance of the estate that may remain after the payment of the debts of the deceased and the expenses of administration."

Tuck vs. Knapp, 42 Misc., 140, 143, 144.

The Appellate Division seems to have been influenced by case of Hasbrouck vs. Follett, 171 N. Y., 674.

The only opinion in the case was at Special Term, and we submit that this opinion conclusively shows that Hasbrouck against Follett was decided on grounds not applicable to the case at bar. The important portion of Judge Sewell's opinion in the Hasbrouck case is as follows:

"The grounds of this decision, briefly stated, are that a trustee in bankruptcy has only the authority conferred upon him by the provisions of the Acts of Congress relating to bankruptcy. He is not the personal representative of the bankrupt, but the person in whom is vested by law the title to his property. It is the duty of the trustee to collect and reduce to money the property of the estate and to distribute the funds to creditors whose claims have been proved and allowed. He has no power over the claims of a creditor, or the amount that he shall receive, and *can make no compromise or agreement to pay a creditor*

more or less than an equal per centum pursuant to the provisions of that act."

Fols. 78 and 79, Papers on Appeal in Hasbrouck vs. Follett, 171 N. Y., 674.

In other words, what the Court held in the Hasbrouck case was that the condition upon which the remainderman was to obtain possession of the property *had not happened*, because the trustee in bankruptcy had no power to compromise debts (it not appearing that the bankrupt had received a discharge). Whereas, in the case at bar, the condition upon which the remainderman is to obtain possession, namely, that he shall become "financially solvent and able to pay his just debts and liabilities," has happened, both under the general law of the State,

Young vs. Young, 127 App. Div., 130.
Tuck vs. Knapp, 42 Misc., 140,

and has in this very case been held to have happened by a court of competent jurisdiction, *Re Farmers Loan & Trust Co.*, 65 Misc., 418, and both defendants are bound by that decision.

Matter of Marx, 117 App. Div., 890.
Peters vs. Bain, 133 U. S., 670.
Daniels vs. Tearney, 102 U. S., 415.

The respondents are not supported by any authority. The appellants are supported by St. John vs. Dann and Turk vs. Knapp (*supra*).

All the authority that exists on the subject supports the appellant.

POINT TEN.

The fact that the bankrupt estate has been closed and reopened is immaterial.

When the contingency happened upon which the bequest was conditioned, the principal of the trust fund should have been paid to the trustee in bankruptcy. This Court has determined that where a bankrupt was the owner of a contingent remainder, his trustee in bankruptcy was entitled to payment thereof when the remainder vested after the bankruptcy.

Hammond vs. Whitredge, 204 U. S., 538.

And the fact that the trustee in bankruptcy had been discharged, did not deprive him of title thereto.

"By the adjudication in bankruptcy and the appointment of the trustee, the bankrupt was divested of all title to his property (Rand vs. Iowa Central R. Co., 186 N. Y., 58) and nothing has occurred by which the title has been restored to the bankrupt or his heirs. The discharge of the trustee should not preclude an application to open the discharge and reinstate the original trustee or appoint a successor."

Kempner vs. Bauer, 53 Misc., 109.

Hammond vs. Whitredge, 204 U. S., 538.

So in a case which was reopened twelve years after it had been first closed on the ground that a claim reported in the first proceeding of no value, had since become of value, the District Court said:

"He (the bankrupt) did not own it. He had surrendered the claim to the trustee in bankruptcy of his estate, of which this claim was a part. So far as Lighthall and his estate is concerned, this increase in value of this claim was the result of the work of other and outside parties, and their acts were not of his procurement, or done for his benefit. He had no part in them. This claim was not his. He had no interest in it. All increase in its value inured to the benefit of his trustee in bankruptcy, for the benefit of the creditors of Lighthall (the bankrupt), who existed as such prior to the bankruptcy, and who had proved their claims.

If a bankrupt, on filing his petition in bankruptcy, owns a note of \$1,000 against B., and schedules it as an asset, and B. is at the time worthless and unable to pay it, or any part of it, the note is an asset, and title passes to and vests in the trustee, when appointed and qualified. It remains there until sold or disposed of. If the estate is closed, and the trustee discharged, his title is not divested and title revested in the bankrupt."

Re Lighthall, 221 Fed. Rep., 791, at 794.

In the case at bar, the estate was reopened and the original trustee was reinstated for the express purpose of reducing the trust fund to possession

and this precludes all questions of divestment of this cause of action.

Bilafsky vs. Abraham, 183 Mass., 401.

This Court has expressly held that a bankrupt does not, by his discharge in bankruptcy, reacquire title to property owned by him prior to the bankruptcy.

In the case of *First National Bank vs. Lasaster*, 196 U. S., 115, the Court had before it an action by a bankrupt to recover property owned by him at the time he filed his petition and which his trustee in bankruptcy then discharged had not reduced to possession. The Court expressly held that the discharge of the trustee did not reinvest the bankrupt with title to the estate and said:

"It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it."

In *Kempner against Bauer*, the Supreme Court of New York and this Court in the *First National Bank against Lasaster*, both held that the bankrupt is not, by the discharge of his trustee, revested with title to property which has been acquired by the trustee in bankruptcy.

POINT ELEVEN.

The complaint does not show any abandonment by the plaintiff.

This is a demurrer to the complaint and the complaint must be sustained unless it shows on its face

that the plaintiff has not a cause of action. Below the defendant trust company advanced the theory that the plaintiff should not be allowed to recover because he had abandoned this claim. Abandonment is a defense and can never be made out unless it is shown both that the trustee in bankruptcy *had actual knowledge of the existence of the asset and intended to abandon.* This complaint shows neither actual knowledge in the trustees nor does it show any intent to abandon.

"In my opinion, neither refusal nor abandonment can be properly established by mere silence or inaction under the circumstances disclosed by the foregoing statement of facts. When there is a duty to act, either actually known to exist or legally imposed by reason of such notice as is the equivalent of knowledge in fact, failure to stir may be significant but when no such duty exists, mere inaction furnishes ordinarily an unsafe basis for the inference that doing nothing should be held to be as weighty as conduct."

Re Wiseman & Wallace, 159 Fed. Rep., 236.

To the same effect are:

Clark vs. Clark & Hackett, 17 How. (58 U. S.), 315.

Hammond vs. Whitredge, 204 U. S., 538.
Gay vs. Kingsley, 11 Allen, 345.

"The question whether or not title may be held to have passed by abandonment in any

case, turns fundamentally upon the fact of an intent to so abandon upon the part of the original owner * * * and this question becomes one of law only where the evidence with regard to such fact is conclusive."

Jones vs. Wick, 10 Misc., 112, 114.

Because no facts in the complaint show abandonment, the demurrer must be overruled.

POINT TWELVE.

The Statute of Limitations cannot be raised by demurrer.

Below the defendant trust company referred to a short Statute of Limitations. The appellant claims that this statute does not apply since the statute runs only from the final closing of the estate, which has not yet taken place.

Bilafsky vs. Abrahams, 183 Mass., 401.

The Statute of Limitation can be raised only by answer. As this case was brought in the Courts of the State of New York, of course, the New York rule of pleading governs *the raising of the defense of the Statute of Limitation and must be followed*. Chapter IV (Sections 362-415) of the Code of Civil Procedure in New York treats of the Statute of Limitations being headed "Limitation of time of enforcing a civil remedy." Title III of said chapter is headed "General Provisions," and the first sentence of Section 413 in said title three of said Chapter 4 reads as follows:

"The objection that the action was not commenced within the time limited, can be taken *only* by answer."

POINT THIRTEEN.

The judgment should be reversed.

Since under New York Law the bequest to the bankrupt vested in said bankrupt an absolute property right which was a conditional limitation, since under New York Law a conditional limitation is an expectant estate and all expectant estates are assignable, since under the Bankruptcy Act whatever is assignable by the bankrupt vests in the Trustee in Bankruptcy, and since any intention of the testator that the bequest should not go to creditors is contrary both to public policy and the express provision of the National Bankruptcy Act, the plaintiff is entitled to the bequest at bar and the decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

DAVID J. GALLERT,
Attorney for J. Harry Hull
as Trustee in Bankruptcy of
the estate of Francis J. Palmer,

Plaintiff in Error.

DAVID J. GALLERT,
WALTER S. HEILBORN,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1916.

J. HARRY HULL, as Trustee in
Bankruptcy of the Estate of
Francis J. Palmer, Bankrupt,
Plaintiff-in>Error,

against

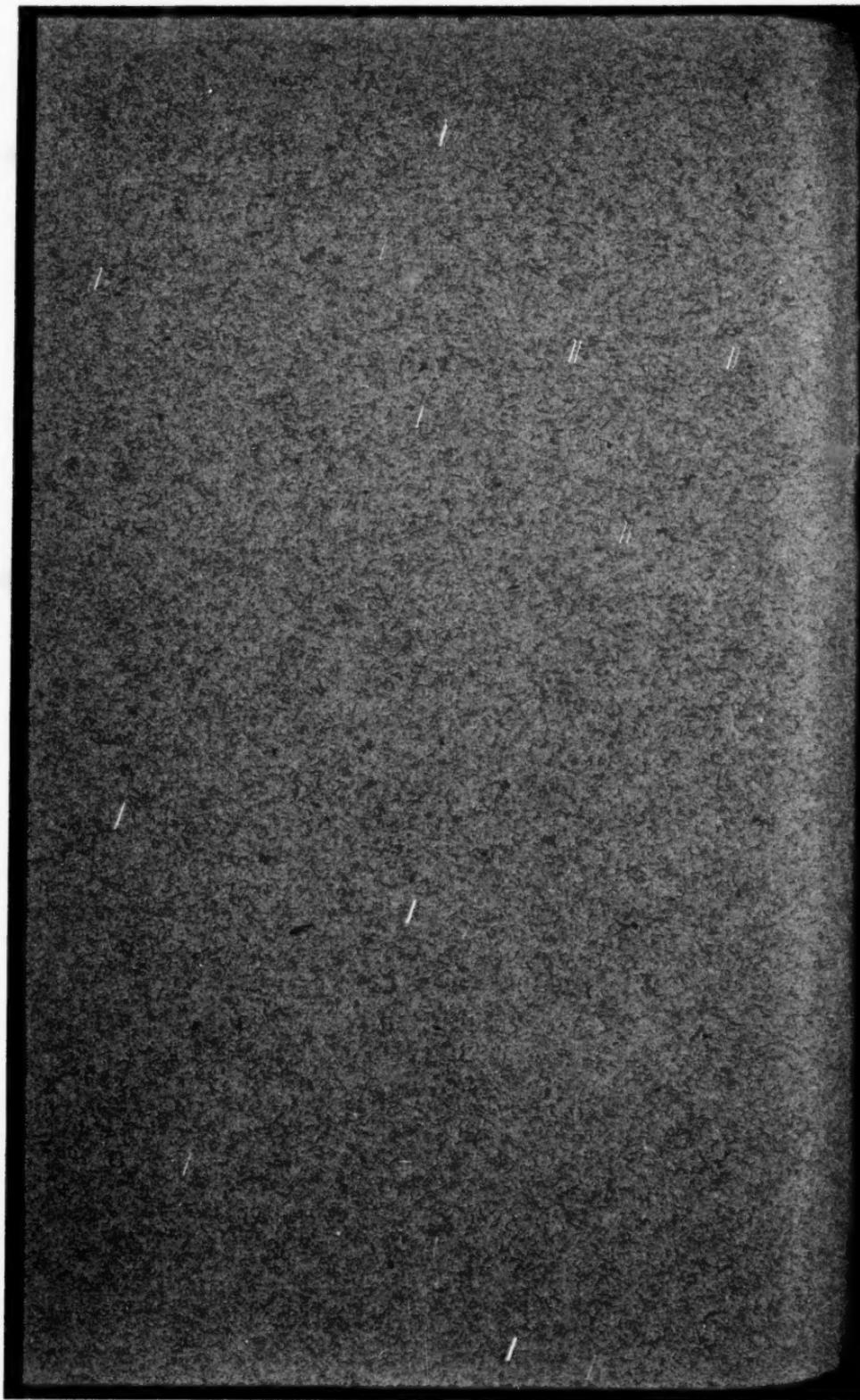
No. [redacted] 66

THE FARMERS' LOAN AND
TRUST COMPANY and
FRANCIS J. PALMER,
Defendants-in>Error.

PLEA FOR DEMAND AND JUDGMENT
FRANCIS J. PALMER.

HENRY B. TWOMBLY,
Collector for said Defendant-in>Error,
2 Beaver Street,
New York, N.Y.

Henry B. Twombly,
Collector of Taxes,
of Counsel.



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against }
THE FARMERS' LOAN AND TRUST
COMPANY and FRANCIS J.
PALMER,
Defendants-in-Error. } #322.

BRIEF ON BEHALF OF THE DEFENDANT-RESPONDENT, FRANCIS J. PALMER.

This action was brought in the New York Supreme Court by the trustee in bankruptcy to reach the principal of a trust fund created by the will of Charles Palmer, the father of the respondent, Francis J. Palmer.

The defendants, Francis J. Palmer, and the Farmers' Loan & Trust Company, demurred to the complaint on the grounds that the trustee in bankruptcy had no legal capacity to sue, as no right, title or interest in and to said fund ever vested in him, and that the complaint did not state facts sufficient to constitute a cause of action. The

demurrers were sustained by the New York Special Term; the judgment entered thereon was unanimously affirmed by the Appellate Division, 155 App. Div., 636; and by the New York Court of Appeals, 213 N. Y., 315. From the final judgment, the plaintiff has appealed to this Court, claiming that Francis J. Palmer had a property right in the trust fund which vested in the trustee in bankruptcy on his appointment.

Statement.

Charles Palmer, the father of Francis J. Palmer, died March 11, 1907, leaving a last Will and Testament which was duly admitted to probate by the Surrogate of Kings County on April 9, 1907.

The will in the Fourth paragraph provided as follows:

"FOURTH.—I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers' Loan & Trust Company, the sum of Fifty thousand Dollars, to be held by said The Farmers' Loan & Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall

become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, per stirpes, and in default of such issue to pay the income from said fund quarterly to my said daughter Rosalie H. Coleman during the term of her natural life, and upon the death of the survivor of my said son and daughter there being no issue of my son him surviving, to divide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living

in equal shares per stirpes to their use, absolutely and forever" (Record, p. 6).

The Farmers' Loan & Trust Company was appointed executor and trustee under said will, and letters testamentary were duly issued by the said Surrogate to the Farmers' Loan & Trust Company on the 9th day of April, 1907. Thereafter said Trust Company received the said sum of Fifty thousand Dollars to be administered under the provisions of said Fourth paragraph of said will.

On July 22, 1907, Francis J. Palmer filed a voluntary petition in bankruptcy in the United States District Court in the Southern District of New York, and on or about May 7, 1908, he was duly discharged of all his debts.

It will be noted that the creditors whom appellant represents, *were parties* to the bankruptcy proceedings, and *opposed* his discharge on the ground that this very interest under his father's will had not been included as an asset in his bankruptcy schedule; that their claim was overruled by the Court and the discharge granted; and yet these same creditors wait *three years*, lacking four days, to attempt to assert their alleged claim by obtaining on their ex parte motion a re-opening of the bankruptcy proceedings, and until the time limitation to vacate the discharge and to appeal from the order had long since expired.

The plaintiff was first appointed trustee in bankruptcy on September 6, 1907, and on November 8, 1907, he presented his final report, and was discharged as trustee.

On August 24, 1910, the Farmers' Loan & Trust Company as trustee, paid to Francis J. Palmer

the principal of said trust fund, amounting in cash and securities to \$48,649.14.

On May 3, 1911, the said District Court ordered that the bankruptcy proceedings be re-opened, and on May 19, 1911, the plaintiff was reappointed trustee of the estate of Francis J. Palmer.

On January 8, 1912, this action was begun in the New York Supreme Court by the trustee in bankruptcy with the result that final judgment was entered against the claim of the plaintiff.

POINT I.

Assuming, simply for the purpose of argument only, but not admitting, that Francis J. Palmer had a contingent interest in the principal of the trust fund at the time of adjudication in bankruptcy, nevertheless such interest by the very terms and conditions of its creation could not be reached by creditors.

The fund belonged to the father and he could do with it what he pleased. Upon examination of the claims of the alleged creditors on file in the District Court, it will appear that all of them were against Francis J. Palmer as accommodation endorser of notes of a corporation of which he was an officer, and that Palmer never had the benefit personally of any of the money. Under such circumstances, is it in any way remarkable that the father should be unwilling to use his own money for the payment of accommodation debts of his son, when he, the father, was under no such obligation either legal or otherwise?

Plainly the testator was fully determined that no part of the trust fund should be used in the payment of any such debts. He was, however, perfectly willing that his son should receive this fund, provided he should, *by resources other than the principal of the trust fund*, free himself from all his just debts and liabilities, and provided also the Trust Company "absolutely in its own judgment" should become satisfied that the principal of the estate could not be reached by the creditors of Francis J. Palmer, but would remain intact for his personal use. He was not willing and did not intend that the principal of the estate should be used to pay his son's old debts, and he took great care not to give his son any interest in this fund, present or future, which could be reached by any of his old creditors. There was nothing contrary to public policy in this declared intention, for it was no part thereof that his son should "have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors" (Ullman vs. Cameron, 186 N. Y., 339, 345), for the express provision was that the son was to be absolutely free from all debts, before he could have any interest whatever in the fund.

In McClelland vs. Rose, 208 Fed. Rep., 503 (C. C. A) the Court said:

"There is no reason in the recognized nature of property and in the owner's right of disposition why a testator who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued

use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self protection, should not be permitted to do so, is not readily perceived."

On June 10, 1902, the case of Hasbrouck vs. Follett (171 N. Y., 674) was decided by the Court of Appeals. This case decided the precise question involved in the case at bar. In that case a similar provision in the will of one Henderson was held valid against the claims of a trustee in bankruptcy (see discussion of case in 155 App. Div., 643). The Court said :

"One Ann Henderson left a will, by which, among other things, she gave one-third of her residuary estate to the defendant Follett, as trustee, for the benefit of a daughter, Frances A. Davenport, with a condition that 'If Frances A. Davenport shall at any time certify in writing to the then trustee of the trust that she has satisfactorily compromised, adjusted or become freed from any and all claims now outstanding against her, whether now in judgment, suit or otherwise, then said trust shall terminate and said trust fund or estate shall go to her and become hers absolutely.'

"Frances A. Davenport went into bankruptcy, and her trustee in bankruptcy claimed, as does this plaintiff, to have become vested, by virtue of his appointment, of her condi-

tional right to receive the corpus of the trust estate. He entered into an agreement with all of her creditors for the compromise of their debts at a figure which would enable him to pay them out of the trust fund if he should receive it. He thereupon, acting as he claimed in the right of bankrupt, notified said trustee under the will that he had compromised and adjusted all of the claims against the bankrupt, and demanded that the trust fund be paid to him. Being refused, he sued, and his complaint was demurred to as in the present case. The court at Special Term sustained the demurrer, the court saying:

'It is clear from the language and scope of the will of said Ann Henderson that she intended to provide a fund for the support of her daughter, that could not be reached or applied to the payment of debts. The words 'compromised' and 'adjusted' in the fifth clause of the will, like the words immediately following, were designed to operate and did operate to prevent the bankrupt, her trustee or any other person from terminating the trust and acquiring the property prior to the actual payment or extinguishment of her debts.' "

It was perhaps with the case on appeal in said case of Hasbrouck vs. Follett in hand, and in reliance thereon, that the will of Charles Palmer dated May 4, 1903, was drafted. Certain it is that that decision established the law in New York State, and that decision has been uniformly followed. (Siemers vs. Morris, 169 App. Div., 411 (1915); Hull vs. Palmer, 213 N. Y., 315 (1915).

The argument in favor of this position was fully set forth in the opinion of the Court of Appeals herein (213 N. Y., 315, 320), wherein the Court said:

"Said Palmer was adjudicated a bankrupt on his own petition on July 22nd, 1907. On September 11, 1907, the plaintiff was appointed, and qualified as trustee, and on November 8th, 1907, he presented his report and was discharged. On May 7, 1908, said Palmer was duly discharged of all his debts. Thereafter the Farmers' Loan and Trust Company instituted a proceeding in the Surrogates' Court for the judicial settlement of its accounts, wherein it was determined:

'That the interest of the defendant, Francis J. Palmer in and to the principal of said trust fund had by his discharge in bankruptcy become a vested interest and that the trust created by the 4th paragraph of the last will and testament of said Charles Palmer was thereby terminated, and that the condition in said will of said Charles Palmer contained was thereby fulfilled and said trust of said Fifty thousand dollars determined,' and thereafter, and on the 24th day of August, 1910, the trust company paid over to Palmer in cash and securities the principal of said trust fund. On May 3, 1911, the estate of the bankrupt was re-opened by the order of the United States District Court for the purpose of administering upon the principal of the said trust, and on May 19th, 1911, the appellant was re-appointed trustee.

The decision in this case turns on the question whether the plaintiff upon his appointment, as trustee, on September 11, 1907, acquired title to any interest of the bankrupt under the said fourth clause of the will of his father, because, if he did not, there were no unadministered assets for him to be re-appointed to administer.

I shall assume that the testator bequeathed to his son a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition, upon which the trust was limited, was fulfilled, and I shall assume, also, that that interest was assignable under the authority of *National Bank vs. Billings*, (203 N. Y., 556). It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors. *It is to be observed that this is not a case in which a testator has undertaken to make a gift, and to keep it from his donee's creditors.* It might in some aspects be termed a gift to encourage the donee to pay his debts, because, only by making such payment, or by showing the ability to pay, could the donee have the gift. The condition was that the donee 'shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund.' The testator had a right to impose that condition. He had a right to keep his property away from his son's creditors by not giving it to the son at all, unless the latter was able to pay his debts from other resources,

and in the plainest language the testator manifested an intention to do precisely that thing. If, upon his appointment, he acquired the contingent interest of the bankrupt, he could sell it, applying the proceeds to the payment of the bankrupt's debts. Then, upon the bankrupt's discharge, assuming that to be a payment of his debts within the intention of the testator, which may be doubted, the assignee would be entitled to demand the principal of the trust fund from the trustee. Thus, by a process of indirection the fund, which the testator gave to his son only on condition that he should become able to pay his debts, would be used for the very purpose of satisfying that condition, and of frustrating the testator's intention. The gift would vest upon the defeat of the testator's purpose, not upon the fulfillment of the condition imposed by him. It does not seem necessary, therefore, to indulge in definitions or in nice distinctions. The nature of the condition itself determines the controversy. The creditors or their representative, the trustee in bankruptcy, were prevented from acquiring the contingent interest of the bankrupt, because to permit this would prevent the gift from ever taking effect as contemplated by the testator upon the fulfillment of a valid condition imposed by him.

The plaintiff seeks to reach the fund on the theory that the trustee has wrongfully paid it over to the bankrupt. In that view the plaintiff's rights are certainly no greater than as though the trustee still held it. The condition then has not been satisfied, because

certainly the donee's discharge in bankruptcy was not a payment of his debts within the contemplation of the testator if his creditors prior to the discharge are at liberty to take the fund."

The claim of the plaintiff seems to be that the condition of the will was fulfilled by the discharge in bankruptcy of Francis J. Palmer of and from all his debts, and that thereupon as trustee for the creditors whose debts had been already discharged, he could seize this fund, and pay the same persons as creditors, although they were no longer creditors.

If these creditors were to be paid out of the principal fund, then the condition of the will that the fund belonged to the son, only in case these very creditors were paid *out of other resources*, was never fulfilled, and there was nothing out of which the creditors could be paid.

The plaintiff argues in a vicious circle, which gets nowhere. It is perfectly clear that the son was to get nothing except and until his indebtedness was discharged, and he was wholly free from his creditors; he could not be free from his creditors if they had the right to this fund, the title to which came to him only in case he was first free of these same creditors.

The same argument was stated by the Appellate Division (155 App. Div., 636 at 642) as follows:

"A trustee in bankruptcy of course takes no higher estate or greater interest than the bankrupt himself possesses when the trustee is appointed, and the title which the trustee ac-

quires by virtue of his appointment is no better than he would have acquired if the bankrupt had made an assignment to him. Let us suppose that the bankrupt had, in fact, assigned to the trustee his conditional right to be paid the principal of the trust fund. That of itself would carry no right to payment of the principal, for the condition must first be complied with. That condition was that all debts and liabilities should be paid, 'from resources other than the principal of this trust fund.' It certainly would not fulfill this condition if the trustee were to demand possession of the principal in order to apply it to the payment of the bankrupt's debts, and it is equally certain that the trust company could not lawfully pay the principal over either to the bankrupt or the trustee until it was satisfied that the bankrupt had acquired financial ability from resources other than the trust fund itself to pay all of his liabilities. To argue otherwise is to travel in a circle.

"We may leave out of sight for the present the fact that the trust company has already paid Francis J. Palmer, for the plaintiff claims that it had no right to do so, and consider the question as if the fund were intact in the hands of the trust company, from whom plaintiff seeks to collect it. His right to do so would be predicated upon the proposition that Francis J. Palmer's debts were cancelled by his discharge in bankruptcy, and consequently that he had no debts and liabilities to be satisfied, and, therefore, that the conditions in the will had been satisfied. At the same time, however,

in order to justify his claims as trustee to collect the fund, he would be compelled to assert that there still were creditors of Palmer who were entitled to have his property applied to payment of their debts, and that it was his purpose, as it would be his duty, if he obtained the principal of the fund, to apply it to the payment of these creditors."

POINT II.

Francis J. Palmer had no title to the fund in the hands of the Trust Company at the time of his adjudication in bankruptcy, which he could have assigned, or which passed to his trustee.

The Appellate Division (155 A. D. 636, at 640) said as to this question, as follows:

"It is desirable, therefore, at the outset, to consider the precise condition upon which under his father's will Francis J. Palmer might receive the principal of the fund put in trust for his benefit. In the first place, there is no express gift to him either *in future* or *in praesenti*, nor is there to be found a distinct direction to the trustee to pay the principal over to him at any time or upon any condition. The one controlling condition which attached to the payment of the fund to the son Francis J. Palmer is, not only that he shall become financially solvent, but also that he shall become liable to pay all his just debts and lia-

bilities from resources other than the principal of this trust fund.' The trustee was made the sole judge as to whether this condition had been complied with, and, having received satisfactory evidence on that point, it was 'authorized and empowered' not directed, to pay over the principal to the son 'in its own judgment, and without its judgment in such case being subject to revision by any other person or authority' so that the ultimate event upon which payment to the son was to take place was the exercise of the trustee's judgment, which, however, was so limited that it could not be exercised in favor of paying over the principal until it was satisfied that the condition as to solvency and ability to pay his debts had arrived. If we contrast the provisions of this will with those contained in the two cases mainly relied upon by the plaintiff, we shall discern radical differences. In National Park Bank vs. Billings (*supra*) the testator made a bequest to trustees for the benefit of his wife for her life. At her death he provided: 'It is my will and I direct that my trustees and executors or the survivor of them do and shall at once upon the death of my wife divide the principal of my estate * * * and shall set apart one share, one half part, for my son or his issue * * *;

"If the son had not attained the age of twenty-five years the share was to be held by him until he attained that age, and then paid over to him. If he died before the death of his wife, or after her death and be-

fore attaining the age of twenty-five years, his share was to be paid to his issue. It was held that the will did contain a gift to the son, not in express words, but in a direction to the trustees to divide and pay, which was held to be equivalent to an express gift *in praesenti*, with futurity attached only to the right of possession. It was, therefore, found by analogy to the rules affecting devises of real estate that the will created a present property interest which he could assign, which, therefore, could be reached by his creditors; that the son 'acquired upon the death of his father, not a bare possibility merely, but the right to the possession and enjoyment of one-half of his father's estate in the event that he should attain the age of twenty-five years and survive his mother, and that right *was not subject to the will of a third party.*' It is apparent that the will of Charles Palmer, the bankrupt's father, produced a very different condition of affairs."

"That Francis J. Palmer should satisfy the trust company that he was 'solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund,' and that the trust company should thereupon decide 'in its own judgment' that the fund should be paid to him, were clearly conditions precedent to be performed before he acquired any right or title to the trust fund (*Kenyon vs. See*, 94 N. Y., 563; *Booth vs. Baptist Church*, 126 id., 241). That condition had not been complied with when he became adjudicated a bankrupt, and was never complied with until his debts

had been extinguished by his discharge. He had, therefore, no title to the fund at the time of his adjudication which he could have assigned, or which passed to his trustee, and consequently the latter never acquired any such title."

It is true that Judge Miller, speaking for the Court of Appeals, said (page 320) :

"I shall assume that the testator bequeathed to his son a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition upon which the trust was limited, was fulfilled, and I shall assume, also, that that interest was assignable under the authority of *National Park Bank vs. Billings* (213 N. Y., 556),"

but the judgment of the Court was not based on that assumption, which was plainly *obiter dicta*. It was as if Judge Miller had said:

"Even assuming that the testator bequeathed to his son a future contingent interest in the principal, and further *even assuming* that such interest was assignable under the authority of *National Park Bank vs. Billings*, 203 N. Y., 556, it does not follow that such contingent interest, though, for the purpose of argument we assume it to be assignable, could be reached by creditors."

The Court of Appeals then held that the nature of the bequest was such that it could not be

reached by the creditors. That was all that the Court of Appeals actually decided. On the other hand, the Appellate Division actually decided that he had

"No title to the fund at the time of his adjudication, which he could have assigned, or which passed to his trustee, and consequently the latter never acquired any such title" (page 644).

As far as the question of the title to the fund is concerned, the decision of the Appellate Division resting squarely on the absence of title in the trustee, is the law in New York State. Moreover, the Appellate Division rested its decision on the case of Hasbrouck vs. Follett, 171 N. Y., 674, above referred to, which affirmed a decision of the Special Term that under similar facts, such a clause in the will was "designed to operate and did operate to prevent the bankrupt, her trustee, or any other person from terminating the trust, and acquiring the property prior to the actual payment or extinguishment of her debts" (page 644).

It will be particularly noted that the will of Charles Palmer provided for a life interest for Francis J. Palmer in the income of the principal fund only, with the remainder over to the lawful issue of said son him surviving, in equal shares. Francis J. Palmer had no vested interest in the principal fund at all, and his issue held a vested remainder in the principal fund subject only to be divested in case Francis J. Palmer should free himself from debts from resources other than the principal of this trust fund. He had no contin-

gent or future interest of any kind, when the adjudication was made on July 22, 1907.

The one controlling condition which alone could give him any right to the fund, and which alone could affect the right of the vested remaindermen, was not only that he should be financially solvent but also able to pay his debts from resources *other than the principal of the fund*. It was not a contingent estate, for he had no estate which was dependent on any contingency. The provision is not that he was to have a remainder interest subject to his discharge from his debts, but the remainder interest is in his lawful issue, and he has no interest in it at all until he has discharged his debts from other resources.

It was simply a possibility that he could defeat the vested remainders upon the uncertain happening of a future possible event. What that event was, was definitely fixed by the will as the payment of all his debts from resources other than the principal of the trust fund. Until that event happened, he had nothing at all, for the whole estate was vested in the trustee for the life of Francis J. Palmer, and the remainder in his lawful issue.

In the District Court on the motion to set aside the order reopening the bankruptcy proceedings, Judge Hough said in part:

"It further appears from the records of this Court, that when this discharge was applied for, the same creditors who obtained the order to re-open opposed discharge upon the ground that the bankrupt, by failing to schedule said interest under his ancestor's will, had thereby made a false oath, and thereby disentitled himself to discharge under the

combined effect of Sections 29 and 14. The Special Master, without passing upon the creditors' proposition exactly as raised by them, held:

- a. That the trust fund existed;
- b. That it was inalienable and could not have been transferred by the bankrupt prior to the filing of his petition and thereafter was not properly within the purview of the act; and
- c. That what the bankrupt had done was under advice of counsel, thereby inferentially negativing any fraudulent intent on his part.

These findings were approved by this Court and the discharge granted."

This finding of the Court is supported by the United States cases:

In re Wetmore, 99 Fed. Rep., 703, opposition to discharge was made on the ground that the bankrupt had not included in his schedules an alleged interest under his father's will and that concealment was fraudulent on his part. The will gave \$100,000 in cash in trust for his wife with power of disposition by will, with remainder, if she failed to exercise the power to his next of kin. The bankrupt was his son and the mother died three months after he was adjudged bankrupt, leaving him \$55,000 in cash.

The Court held

"that the mere fact of not including the alleged interest in the schedules did not constitute fraud and the exceptions were overruled."

In the same case, 102 Fed. Rep., the Trustee in Bankruptcy petitioned for an order directing the bankrupt to pay over the \$55,000.

The Court held *that no interest was vested* in the bankrupt and sustained the demurrer and dismissed the petition. This case arose under a New York will and was decided under New York law. The Circuit Court of Appeals, 108 Fed. Rep., 520, affirmed the Court below, dismissing the petition and stating:

"While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. * * * If the bankrupt had an expectant estate, it undoubtedly passed to the Trustee. But if he had no claim or title, absolute or defeasible, vested or contingent, but merely an expectation of an estate, or interest in the future, then there was nothing in him to pass to the trustee."

In re Ehle, 109 Fed. Rep., 625, the will left an estate in trust until death of two daughters, then to be divided among his grandchildren or their children.

The Court held that a grandson

"had no vested interest, never may have any. The contingency is personal to the bankrupt as to whether he shall ever take at all under the will, and not as to time when he shall surely take."

In re Hoadley, Dis. Ct., N. Y., 101 Fed. Rep., 233 (Brown, J.) it was held that where property

is devised by will to trustees with direction to apply the income for the benefit of a named beneficiary for life and at her death divide remainder among such children as may then be living, none of the children has any right or interest in the estate *such as was alienable* under the laws of New York, and none which *would rest in the trustee in bankruptcy.*"

The plaintiff relies almost entirely upon the decisions in the cases of *National Park Bank vs. Billings* (144 App. Div., 536, affirmed 203 N. Y., 556) and *Tuck vs. Knapp*, 42 Misc., 140.

The National Park Bank case is entirely inapplicable to the facts of this case. In that case

"the testator made a bequest to trustees for the benefit of his wife for her life. At her death he provided:

'It is my will and I direct that my trustees and executors or the survivor of them do and shall at once upon the death of my wife divide the principal of my estate * * * and shall set apart one share, one-half part, for my son or his issue. * * *'

If the son had not attained the age of twenty-five years the share was to be held by him until he attained that age, and then paid over to him. If he died before the death of his wife, or after her death and before attaining the age of twenty-five years, his share was to be paid to his issue. It was held that the will did contain a gift to the son, not in express words, but in a direction to the trustees to divide and pay, which was held to be equivalent to an express gift *in praesenti*, with futurity attached only to the right of possession. It was, there-

fore, found by analogy to the rules affecting devises of real estate that the will created a present property interest which he could assign, which, *therefore*, could be reached by his creditors; that the son 'acquired upon the death of his father, not a bare possibility merely, but the right to the possession and enjoyment of one-half of his father's estate in the event that he should attain the age of twenty-five years and survive his mother, and that right *was not subject to the will of a third party.*' It is apparent that the will of Charles Palmer, the bankrupt's father, produced a very different condition of affairs."

The opinion while calling the interest of the son a contingent interest states that the gift cannot be distinguished from a vested interest subject to be divested. The Court said:

"If there had been a gift in express words to the appellant, coupled with a gift over in the event of his death prior to that of his mother, he would have a vested interest subject to be divested by such prior death, and I take it, *Bergman vs. Lord* (supra) would be a direct authority for the proposition that such interest could be reached in a judgment creditor's suit. But what possible reason can be suggested for differentiating such a case from this, except that different words are used to describe an interest, which in neither case would ripen into an estate in possession and enjoyment unless he survives his mother?"

The situation in this case is wholly different, for here the son had no interest and could not have any

interest in the trust fund until his debts and liabilities were paid. It was a mere possibility unaccompanied by any interest.

See also

Young vs. Young, 127 A. D., 130, 131.

Tuck vs. Knapp, 42 Misc., 140 (1903) was a decision by a Judge at Trial Term, which was never appealed from. The will gave all the testator's property to his son in trust to pay a certain annuity and then to pay himself the income of the balance until he had satisfied all judgments, and then to pay himself the principal. The Court held:

"The second trust was created for the benefit of Charles. He was to receive the income until such time as the judgments against him were satisfied. Upon the happening of that event he was to receive the principal. In case of his death prior to the happening of such event the property was to go to the children of the testator then living. As to this trust Charles was both trustee and beneficiary and he must be deemed to have a legal estate in the fund of the same quality and duration and subject to the same conditions as his beneficial interest.

"The plaintiff in this action is the trustee in bankruptcy of Charles W. Knapp. By virtue of his appointment, in him became vested all the property rights which the latter acquired under the will of John O. Knapp. Among other things he has acquired the right, from the date of his appointment, to all the income arising from the trust which the testator endeavor-

ed to create for the benefit of Charles W. Knapp, and the right to the principal of such trust when the judgments against Charles W. Knapp are satisfied."

In that case the trustee was held to be entitled to the income as well as the principal of the trust estate; that the will vested a present interest, which was assignable. That case surely is no authority for the principle contended for by the plaintiff.

In *Clove vs. Scavay*, 208 N. Y., 496, the interest in question was a vested remainder interest subject only to be divested in case the beneficiary died before the death of the person holding the life interest.

In *St. John vs. Dann*, 66 Conn., 401, the provision of the will gave the property to trustees to be held for the use and benefit of Dann and his family until Dann shall discharge his present liabilities by payment, compromise or otherwise, and then the trustees were directed to transfer the principal to Dann. There was no remainder over to other parties, and no discretion vested in the trustees. The Court held that the ultimate and absolute title to the property

"became vested as soon as the will took effect in George L. Dann in fee simple, subject only to the terms of the trust."

In that case therefore there was no question of a contingent estate, as the Court held it an estate in fee simple.

On the other hand, the situation is quite analogous to that found in *Kenyon vs. See* (94 N. Y., 563, 567). There a testator bequeathed in trust a third of his entire estate to pay the interest there-

of to his grandson, Seymour Hobart Spencer, semi-annually "upon the express condition that the said Seymour Hobart Spencer shall renounce the Roman Catholic priesthood * * * and upon the further condition that said Seymour Hobart Spencer shall marry, I give, devise and bequeath the said money held in trust, together with the accumulated interest thereon, to my said grandson." The Court held that Seymour H. Spencer "was entitled to the income only upon and from his renunciation of the Roman Catholic priesthood and to the principal only upon his marriage. The conditions were precedent, and until performance he took no interest, legal or equitable, in the fund." The same rule was recognized in Booth vs. Baptist Church et al. (126 N. Y., 215, 241, 242). In that case a bequest of \$10,000 to the Baptist Church of Poughkeepsie was conditional upon the church raising a sum sufficient with said legacy to pay off the existing mortgage and other debts of said church within two years of the death of the testator; the Court held that the condition was a precedent one; that there was no gift until the condition was fulfilled, and that the fund was to be treated as belonging to the estate and subject to the absolute disposition of the testator if the condition was not performed.

POINT III.

The State Courts then having decided that the Trustee had no title at all in the principal of the Trust Fund, there is no question of which this Court can take jurisdiction.

The case of Rector vs. City Deposit Bank, 250 U. S., 405, holds in substance that when the ques-

tion in the State Court is not whether if the bankrupt had title, it would pass to the assignee under the bankruptcy act, but whether he had title at all, and the State Court decides that he had not, no question of which this court can take jurisdiction under sec. 709 of the Revised Statutes is presented. *Scott vs. Kelly*, 22 Wall., 57.

In *Cramer vs. Wilson*, 195 U. S., 408 (1904), the Court says (at page 416) :

"We have repeatedly held that, when the question in a state court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the state court decided that he had not, no Federal question is presented. *Scott vs. Kelly*, 22 Wall., 57; *McKenna vs. Simpson*, 129 U. S., 506. The same principle was applied to a different class of cases in *Blackburn vs. Portland Gold Mining Co.*, 175 U. S., 571; *De Lamar's Co. vs. Nesbitt*, 177 U. S., 523. In *Williams vs. Heard*, 140 U. S., 529, relied upon by the plaintiffs in error, the property in dispute belonged admittedly to the bankrupts, and the question was whether it was of such a character as to pass to their assignee. Of, course, this involved a construction of the bankrupt act."

POINT IV.

The right of Francis J. Palmer in the fund further depended on the exercise of the discretionary power of the Trustee, and therefore did not pass to the Trustee in Bankruptcy.

The fourth paragraph of the will contained the following:

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"It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust monies shall be full justification and acquittal to the said trustee for the payment thereof."

Bearing in mind that the son is given nothing by the will except under this provision, it seems perfectly plain that the intention of the testator was expressed only in the form of a "wish" dependent on certain conditions; that the carrying out of the wish is left to the trustee which may act on a written statement of the son, or require further evidence satisfactory to itself.

The trustee may then "*absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority,*" pay over, or not, the principal of said

fund to Francis J. Palmer. Could any words be more expressive of the testator's desire to make this gift to his son solely subject to the will of the Trust Company?

As a matter of fact though Palmer received his discharge on May 7, 1908, the trust company did not judge that it was expedient to turn over the principal fund to Palmer until August 24, 1910.

In *Nichols, Assignee, vs. Eaton*, 91 U. S. Rep., 716, we have a case decided by the *Supreme Court of the United States* which seems decisive of the question.

In that case Mrs. Eaton, by her will, devised her estate to three trustees upon trust to pay the income to her four children equally during their natural lives, and after their decease in trust for their children as shall attain the age of 21 years or shall die under that age having lawful issue living.

The will also contained a provision that, if her said sons should alienate or dispose of the income to which they were entitled under the trusts of the will, or if by reason of bankruptcy or insolvency or by any other means whatsoever, said income could not longer be personally enjoyed by them respectively, but the same could become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. *The will contained another provision also as follows:*

"Provided also that in case at any future period circumstances should exist which in the opinion of my said trustees, shall justify or render expedient the placing at the disposal

of my said children respectively any portion of my said real and personal estate, *then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust fund from whence his or her share of the income under the preceding trusts shall arise; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust fund as shall be so transferred, shall absolutely cease and determine.*"

One of the sons of the testatrix was subsequently declared a bankrupt and said Nichols was appointed his assignee in bankruptcy. Thereafter the trustees exercised their discretion under the will and paid to this son a portion of the trust fund held in trust for him to the amount of \$25,000 and the assignee in bankruptcy brought a bill against the executors and trustees for a portion of the said trust funds. The Circuit Court dismissed the bill and the assignee appealed to the Supreme Court. The Court, among other things, said as follows:

(Page 724) "No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court."

"Neither of the clauses of the will contained anything more than a grant to the trustee of the purest discretion to exercise their power in favor of the sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor that the testatrix has in express terms said that such exercise in this discretion is not in any manner obligatory upon them. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the Chancellor for the discretion of the trustees in whom alone she reposed it. When trustees are in existence and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act, and certainly they would not do so in violation of the wishes of the testator."

The Court then proceeds to report the cases in the different Courts of the United States, and on page 729 says:

"The last case we shall refer to especially is that of Campbell vs. Forster, 35 N. Y. Court of Appeals, 361. In that case *it is held*, after elaborate consideration, *that the interest of a beneficiary in a trust fund created by a person other than the debtor, cannot be reached by a creditor's bill*, and while the argument is largely based upon the special provision of the

statute regulating the jurisdiction of the Court in that class of cases, the result is placed with equal force of argument on the general doctrine of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer the bounty."

On page 730 the Court says:

"It is also said that since his bankruptcy, the defendant Amasa has actually received \$25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

"But the conclusive answer to all these objections is that, by the will of decedent—a will, which, as we have shown, she has a lawful right to make—the insolvency of her son terminated all his legal vested right in her estate and left nothing in him which could go to his creditors, or to his assignees in bankruptcy, or to his prior assignee. *And that what may have come to him after his bankruptcy, through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully and cannot now be subjected to the control of his assignee.*"

See, also, *Hasbrouck vs. Follett* above cited.

In *National Park Bank vs. Billings*, 144 A. D., 536, the Court decided that under the terms of the will:

"The appellant then acquired upon the death of his father, not a bare possibility merely, but the right to the posession and enjoyment of one-half of his father's estate in the event that he should attain the age of twenty-five years and survive his mother, and that right was not subject to the will of a third party."

In this case there was no gift to Francis J. Palmer, and no interest dependent upon any certain event, but simply a possibility, and even such possibility is dependent upon the discretion of the Trust Company, which is not "subject to revision by any other person or authority."

There is no question but that the testator desired to further limit the chance of any claim of a creditor against this fund by making the possibility of his son's obtaining his fund, subject to the sole judgment of the Trust Company. His first expression is simply a "wish" that his son might have the principal of the fund, and (2) then only when financially solvent because able to pay all debts and liabilities, and (3) only from funds other than the principal of the trust fund, and then (4) only in the sole judgment of the Trust Company without *revision* by any one.

If there is any virtue in the intent of the testator, or if the Court must consider at all in such a case the *intent* of the testator, then surely the claim of the trustee in bankruptcy must fall.

As was said in *Nichols vs. Eaton*, 91 U. S., 716:

"The doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object

of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

In *Eaton vs. Boston Trust Co.*, 240 U. S., 427, 429, the Court said in a case which approved *Nichols vs. Eaton*,

"we feel warranted in assuming that the power of alienation will not be pressed to a point *inconsistent with the dominant intent of the will*."

So in New York State, it has long been the purpose of the Courts to construe wills so as to carry into effect the intention of the testator, so far as that can be ascertained from the document itself.

Shipman vs. Fanshaw, 15 Abb. N. C., 288;
Shipman vs. Rollins, 98 N. Y., 311;
Matter of James, 146 N. Y., 78, 101.

In this case, as in other cases where a will is the subject of construction, it is the intention of the testator and not the rule of construction which is to govern.

Moak vs. Moak, 8 App. Div., 197.

"A cardinal rule of testamentary construction is that the plain intent of the testator as evinced by the language or his will, must prevail, and such intention may be collected from the whole will taken together."

Kimball vs. Campbell, 27 Abb. N. C., 437; Purdy vs. Haight, 92 App. Div., 454.

IN ALL CASES WHERE THE INTEREST OF THE BANKRUPT IS DEPENDENT UPON THE SOLE DISCRETION OF THE TRUSTEE, HIS INTEREST DOES NOT PASS TO THE TRUSTEE IN BANKRUPTCY.

Collier on Bankruptcy, page 817, says: "When the interest of the bankrupt depends on the exercise of a discretionary power in the trustee, his interest does not pass to the trustee in bankruptcy," citing *In re Wetmore*, 99 Fed. Rep., 703.

Brandenburg on Bankruptcy, page 768, says:

"The trustee in bankruptcy has no title or interest in a will which gives the trustee absolute discretion which he is not obliged to exercise in favor of the bankrupt."

He also cites *In re Hoadley*, 101 Fed. Rep., 233, and *In re Ehle*, 109 Fed. Rep., 625.

It makes no difference that *subsequently* the trustee exercised its discretion, and paid the fund to Francis J. Palmer, for it had absolute discretion at the time of the adjudication, and first appointment of the trustee, and it might or might not have exercised it in favor of the beneficiary.

As was said in *Nichols vs. Eaton*, 91 U. S., 716: "What may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully and cannot now be subjected to the control of his assignee."

POINT V.

The transfer by the Trust Company to the son of the principal fund was in accordance with the intent of the testator, and not against public policy. No creditor had extended credit to the son in reliance on this provision in the will, or in reliance on the property which might come to the son after all creditors, including himself, had been paid. There is no equitable consideration in favor of the son's creditors which would overrule the express intention of the testator, who had a right to use his own property to protect his son even from his own imprudence or ill luck.

The rule applied in this case has been the law of New York, and followed consistently in the New York Courts, and should be followed and upheld by this Court.

May 1, 1917.

Respectfully submitted,

HENRY B. TWOMBLY,
Solicitor for Francis J. Palmer,
Defendant-in>Error.

HENRY B. TWOMBLY,
GERRIT SMITH,
of Counsel.

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Supreme Court of the United States,

OCTOBER TERM—1916.

No. 322.

J. HARRY HULL, as Trustee in
Bankruptey of the Estate of
FRANCIS J. PALMER, Bankrupt,
Plaintiff in Error,

vs.

THE FARMERS' LOAN AND TRUST
COMPANY and FRANCIS J. PAL-
MER,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR THE FARMERS' LOAN AND TRUST COMPANY.

The statement of the case contained in the brief for plaintiff in error is in various particulars insufficient and controverted by defendants in error. We therefore restate the case as follows:

Statement of Case.

This is a writ of error directed to the Supreme Court of the State of New York (Transcript of

Record, page 27) issued under the following circumstances and in the following manner:

The action was brought by plaintiff in error in the New York Supreme Court and the complaint (Record, pp. 4-12) was *demurred* to by defendants (who are also defendants in error) on the grounds (a) that plaintiff was without legal capacity to sue "in that no right, title or interest in or to the fund involved in this action ever vested in him" and (b) that the complaint did not state facts sufficient to constitute a cause of action (Rec., pp. 12-13).

The New York Supreme Court at Special Term *sustained* the demurrers and *dismissed* the complaint (Rec., pp. 13-14), writing an opinion printed on pages 14-16 of the Record. Thereupon plaintiff appealed (Rec., p. 3) to the Appellate Division of the New York Supreme Court which unanimously ordered the judgment affirmed (Rec., p. 16), writing an opinion printed in the Record at pages 18-24. (*See also 155 App. Div., 636.*) Judgment of affirmance was accordingly entered upon the remittitur from the Appellate Division (Rec., p. 17). Thereupon plaintiff appealed to the New York Court of Appeals (Rec., pp. 17-18), and that Court unanimously affirmed the judgment and remitted the record to the New York Supreme Court "to be enforced according to law" (Rec., pp. 1-2), writing an opinion which is printed on pages 41-44 of the present Record. (*See also 213 N. Y., 315.*) Upon this remittitur the usual order was entered by the New York Supreme Court for New York County making the judgment of the Court of Appeals its judgment and directing judgment to be entered affirming its former judgment (Rec.,

p. 25). Judgment of affirmance was accordingly entered January 18th, 1915 (Rec., p. 26), and became the *final judgment* in the action.

Some months later, and in November, 1915, plaintiff filed in the New York Court of Appeals his Assignment of Errors (Rec., pp. 33-35) and *in that Court* addressed a petition to its Chief Judge, the Honorable Willard Bartlett (Rec., pp. 28-33), reciting the above proceedings and praying for a writ of error directed to the *New York Supreme Court* commanding that Court to send the record to the United States Supreme Court and praying for the usual citation and that the amount of the security to be furnished by petitioner be fixed. Upon this petition Judge Bartlett, *as Chief Judge of the Court of Appeals*, on November 20th, 1915, allowed the writ and fixed the amount of bond (Rec., p. 33) and also signed the citation, which was dated on said November 20th (Rec., p. 36). Later, and on December 9th, 1915, he likewise approved the bond (Rec., p. 39). The writ was issued December 2nd, 1915, by the Clerk of the United States District Court (Rec., p. 27) and was served on the Clerk of the New York Supreme Court on December 10th, 1915 (Rec., pp. 28, 38). Then, on December 15th, 1915, the petition, assignment of errors, citation, writ of error and bond were served on defendants in error (Rec., pp. 39-40) who, however, did not accept service thereof and have not in any way waived such irregularities as may exist in the proceedings for the writ.

The object of the suit is to establish plaintiff's claim of title, *as trustee in bankruptcy* of the de-

fendant Francis J. Palmer, to the principal of a fund disposed of under the "Fourth" clause of the will of Charles Palmer, father of said defendant. This "Fourth" clause (Rec., p. 6) reads as follows (italics ours):

"FOURTH: I give and bequeath and direct
"that there shall be paid as soon as con-
"veniently may be after my death, to THE
"FARMERS' LOAN AND TRUST COMPANY, the
"sum of Fifty thousand dollars, to be held
"by said The Farmers' Loan and Trust
"Company, in trust, for the following
"uses and purposes, to wit: To invest
"said money and keep it invested in such
"securities as to my said trustee may seem
"proper and to pay or apply the net interest
"or income thereof to or for the use of my
"son, FRANCIS J. PALMER, quarterly during
"the term of his natural life. **It is my wish**
"in making this provision that my said son
"shall have the principal of said trust fund
"whenever he shall become financially sol-
"vent and able to pay all his just debts and
"liabilities from resources other than the
"principal of this trust fund. In order to
"carry out this design I expressly *authorize*
"and *empower* my said trustee, upon receiv-
"ing a written statement from my said son
"saying that he is financially solvent and able
"to pay his just debts and liabilities from re-
"sources other than the principal of this trust
"fund (which statement my said trustee *may*
"act upon without further investigation) or
"upon receiving such additional evidence of
"the facts *as it in its judgment may require*,
"to pay over to my said son, *absolutely in its*
"*own judgment, and without its judgment in*
"*such case being subject to revision by any*
"other person or authority, the principal of
"the said trust fund, and thereupon his re-
"ceipt for said trust moneys shall be full

"justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, *per stirpes*, and in default of such issue to pay the income from said fund quarterly to my said daughter ROSALIE H. COLEMAN during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to divide and pay over the principal of said fund to the issue of my daughter ROSALIE H. COLEMAN who shall then be living, in equal shares *per stirpes*, to their own use, absolutely and forever."

The will was probated in New York State on April 9th, 1907 (Rec. p. 8), the testator having died a citizen and resident of that State on March 11th, 1907 (Rec. p. 5).

On September 6th, 1907, plaintiff was appointed trustee in bankruptcye of defendant Francis J. Palmer in voluntary proceedings begun July 22nd, 1907 (Rec. p. 4).

The bankrupt had outstanding a large body of debts and liabilities whose holders proved their claims in the bankruptcye proceedings, *but he was without resources* (Rec. p. 10). In view of the latter fact the bankruptcye trustee (whose official bond was never more than \$100) presented his final report very soon after his appointment and was discharged of his trust on November 8th, 1907 (Rec. p. 5).

The bankrupt himself was, on May 7th of the following year (1908), "duly discharged of all his debts" (Rec. p. 8)

Thereafter, and during the year 1909 (See *Matter of Farmers' Loan and Trust Company*, 65 Misc. 418), defendant The Farmers' Loan and Trust Company duly accounted as Executor under the above will in the proper Surrogate's Court in New York State (Rec., p. 8), and that Court having determined (to quote the view of its decision taken in the complaint in the case at bar) "that the interest of the defendant Francis J. Palmer in and to the principal of said trust fund had by his discharge in bankruptcy become a vested interest and that the trust created by the Fourth paragraph" of the will "was thereby terminated, and that the condition in said will * * * contained was thereby fulfilled and said trust of said fifty thousand dollars determined" (Rec. p. 8), the Trust Company, on August 24th, 1910, turned over the trust fund to Francis J. Palmer (Rec. p. 9).

Some months later, namely, in May, 1911, the bankruptcy estate of Francis J. Palmer was *re-opened* for the sole purpose of administering on this fund "as a part of the estate in bankruptcy" and plaintiff was reappointed trustee in bankruptcy (Rec. p. 9). He began this suit on January 8th, 1912, claiming the trust fund in the hands of the discharged bankrupt and his transferees and praying judgment against The Farmers' Loan and Trust Company for any *deficiency* in the trust fund not thus recovered (Rec. pp. 10-11).

POINT I.

There is no Federal question involved, and this Court is, therefore, without jurisdiction.

The decision of the New York Courts turned on the proper *construction* of the will under the law and statutes of New York, the testator's *intention* and the nature of the *condition* imposed by him, without the fulfillment of which the trust fund was not taken from the remaindermen upon whom primarily bestowed and given to defendant Francis J. Palmer. "The nature of the condition itself determines the controversy" says the Court of Appeals (Rec., p. 43), and the State Courts with entire unanimity explained that condition and determined that intention and construction in a manner opposed to plaintiff's claim. Manifestly no Federal question was *actually decided* or *necessarily* involved in reaching the judgment complained of.

But plaintiff in error seeks to import such a question, in order to bring the case before *this* Court, by the following means: He refers to the *opinions* of the three successive State Courts and attempts (unsuccessfully, as we submit) to differentiate in his brief (pp. 5-11) the *arguments* which led those Courts respectively to their identical conclusion. Then, with obvious inaccuracy, on pages 6 and 9-10 of his brief, he *infers* that the Court of Appeals *disagreed* with the lower courts and agreed with himself on certain of the propositions presented, merely because that Court *assumed* those propositions for the purposes of the argument most favorably to plaintiff. Having

thus apparently excluded from the controversy those propositions none of which involved any Federal question (but to which he none the less devotes the great bulk of his brief here), plaintiff in error next, on pages 6-7 of his brief, states what he incorrectly assumes to have been the Court of Appeals' *argument* by taking from the context of its long opinion a single short sentence, and then adds:

"The New York Court of Appeals holds that a *property right assignable* by the bankrupt prior to the filing of his bankruptcy does not necessarily pass to the trustee in bankruptcy. The plaintiff in error claims that under the provisions of Section 70a5 of the Bankruptcy Act, everything unless, as is not the case here, expressly exempted by state statute, that is transferable by the bankrupt prior to the filing of his petition necessarily passes to the trustee in bankruptcy."

This is the Federal question which plaintiff in error claims to be here presented (brief, p. 10), and on page 11 of his brief he says:

"Therefore the plaintiff submits that the sole question before this Court is whether Section 70a5 of the Bankruptcy Act means what it says or whether the State court was correct in disregarding the plain language of the Federal statute."

But, as we understand the decisions of this Court, while, in determining whether or not there exists a Federal question under U. S. Rev. Stat. 709 (now section 237 of the Judicial Code), this Court is at liberty to look for aid into the opinions filed in the case and transmitted here under rule 8 (*Fire Association of Philadelphia v. New*

York, 119 U. S. 110; *Loeb v. Trustees of Columbia Township*, 179 U. S. 472), this Court can consider only Federal questions and cannot entertain a case unless those questions appear affirmatively on the record and the decision was against the plaintiff in error upon those questions and those questions were necessary to the decision.

Murdock v. Memphis, 20 Wall. 590;
Leathe v. Thomas, 207 U. S. 93;
Johnson v. Risk, 137 U. S. 300;
Dewey v. Des Moines, 173 U. S. 193;
N. Y. C. & H. R. R. Co. v. New York, 186
 U. S. 269;
Mutual Life Insur. Co. v. McGrew, 188 U.
 S. 291;
Giles v. Teasley, 193 U. S. 146.

If the judgment complained of is or can be supported also upon other and independent grounds, it must be affirmed or the writ of error dismissed as the case may be.

Ib.

"When the record discloses such other and completely adequate grounds this Court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result."

Leathe v. Thomas, supra.

Where there is a Federal question, but the case may have been disposed of on some independent ground and it does not appear upon which ground the judgment was based, this Court will not take

jurisdiction unless the independent ground was so palpably unfounded that the Court "*must presume that the State Court overruled it.*"

Johnson v. Risk, supra.

Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293.

Allen v. Arguimbau, 198 U. S. 149.

"Where a State Court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention."

Gaar, Scott & Co. v. Shannon, 223 U. S. 468;

Rogers v. Jones, 214 U. S. 196.

Applying these decisions to the case at bar, it appears from the opinions in the Record, including that of the Court of Appeals, as indeed from the very nature of the controversy, that the decision rested neither expressly nor inferentially upon any interpretation of section 70a5 of the Bankruptcy Act, but altogether upon an independent ground, to wit, the construction of the will and the question as to the scope and nature of the conditional right, if any, given by it under New York law to defendant Francis J. Palmer. That was wholly a question of New York law determinable by the Courts of that State. Whether or not, for instance, the New York Court of Appeals' decision in *National Park Bank v. Billings*, 203 N. Y. 556, controlled the will in the case at bar, was strictly a local

question which this Court could not be called upon to review. This Court, as it itself remarked in *Sauer v. New York*, 206 U. S. 536, is "not concerned primarily with the correctness of the rule adopted by the Court of Appeals of New York and its conformity with authority. This Court does not hold the relation to the controversy between these parties which the Court of Appeals of New York had. It was the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this Court." In the case just cited this Court held that no property had been taken in violation of the 14th Amendment *because the New York Courts had decided that the plaintiff did not own the easements which he claimed had been so taken.* In the same way, in the case at bar, no question arises under section 70a5 of the Bankruptcy Act because the New York Courts have decided that the *condition precedent* attached by this New York will to any right whatever of Francis J. Palmer thereunder is incompatible with any title in the plaintiff. This Court cannot be drawn into so purely local a controversy merely because the Court of Appeals, in dealing with the interpretation of the *condition* in this will and its effect, saw fit to *avoid discussion* of certain propositions which it did not deem necessary to determine. Its avoidance of such discussion cannot be distorted into an attempt to construe section 70a5 of the Bankruptcy Act adversely to plaintiff in error. Its opinion is *absolutely silent* on section 70a5. Yet we cannot suppose that if it had believed its opinion to turn on that section no mention of the section would have been made.

"For aught that appears the State Court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 656.

Even if there could be any doubt indulged on this subject, the decisions cited above show that under such circumstances this Court will decline jurisdiction. And even if the Court of Appeals' *assumption* for the purposes of argument of certain propositions could be construed as leaving nothing for further discussion except the Federal question suggested here by plaintiff in error (which, however, we deny), that would not afford a basis for any *presumption* that the Court of Appeals had *overruled* all grounds of decision independent of such Federal question. Moreover, if plaintiff in error believed the Court of Appeals' opinion susceptible of the construction which he now puts upon it, he should have ascertained the correctness of that belief by applying to that Court itself for a certificate expressly recognizing that construction.

Johnson v. Risk, 137 U. S. 300;

Fullerton v. Texas, 196 U. S. 192;

Allen v. Arguimbau, 198 U. S. 149.

Rector v. City Deposit Bank Co., 200 U. S. 405.

Such a certificate could not, of course, confer jurisdiction where jurisdiction would otherwise not exist. But in the absence of such a certificate this Court cannot *assume* that the Court of Appeals meant to pass upon any Federal question,

and we have already shown that no such question was necessarily involved.

Of course a Federal question cannot be imported into the case merely by Assignments of Error.

Missouri Pacific R. Co. v. Fitzgerald, 160 U. S. 556.

Nor can the mere fact that plaintiff in error is a Federal officer create a Federal question.

Bausman, Receiver, v. Dixon, 173 U. S. 113; *Seeberger v. McCormick*, 175 U. S. 274.

And while, where a Trustee in Bankruptey is suing to recover what he asserts to be an asset of the bankrupt estate under the Bankruptey Act, it may not be necessary for him to specify in his complaint the particular Federal question which he deems to be involved (*Rector v. City Deposit Co.*, 200 U. S. 405), nevertheless when (as in the case at bar) "the question in a state court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the state court decided that he had not, no Federal question is presented."

Cramer v. Wilson, 195 U. S. 408.

In the *Rector* case above cited the construction of a section of the Bankruptey Act was involved in the decision and the decision was actually *certified* to have turned thereon. But in the case at bar the exact opposite is true, and the record here presents an analogy to the case distinguished by this Court in the above cited *Rector* decision

as being one "where a right claimed by a trustee in bankruptcy in its final aspect depended solely upon a state law" and "the courts of the United States would follow the construction given by the highest courts of the State to the state law."

The Court will not find in plaintiff in error's brief any discussion of the above authorities. Nor is the Federal question supposed by him to exist here discussed at any length in his brief notwithstanding that brief's great length. By far the greater part of the brief deals with the scope of numerous decisions cited from the New York Courts regarding underlying and collateral questions of New York law and the construction of New York wills which this Court will not review. And the very specification of errors on pages 7 to 8 of the brief in question, as also plaintiff in error's own statement of his position on pages 8-10 thereof, show that his position depends primarily upon a view of the will and of the law of New York now irrevocably decided against him.

POINT II.

The writ and citation were not properly issued, and the writ should therefore be dismissed.

As already pointed out (*supra*, pp. 2-3), the Court where the record rests and which rendered the *final* judgment in this case (being the judgment complained of) and which is the highest Court of the State where such judgment could be had is the New York *Supreme* Court. This was all affirmatively averred by plaintiff in error in his

petition for the writ (Rec. p. 31). The writ therefore was properly directed to the New York Supreme Court. But the *allowance* of the writ, instead of being made by the proper Judge of that Court or by a Justice of this Court, was made by the Chief Judge of the *Court of Appeals*, on November 20, 1915 (Rec. p. 33), long after the record had been removed from the Court of Appeals to the New York Supreme Court and final judgment had been rendered by the latter. And the only citation ever signed was that signed on November 20, 1915 (Rec. p. 36) by the Chief Judge of the Court of Appeals under the same circumstances.

We respectfully submit that the practice followed in this case was not in conformity with U. S. Rev. Stat. Sections 999-1004 and the following decisions of this Court:

Twitchell, petitioner, v. Commonwealth of Pennsylvania, 7 Wall. 321;
Bartemeyer v. Iowa, 14 Wall. 26;
McGuire v. Commonwealth of Massachusetts, 3 Wall. 382;
Polleys v. Black River Improvement Co.,
113 U. S. 81;
Wedding v. Meyler, 192 U. S. 573.

POINT III.

**Section 70a5 of the Bankruptcy Act
is not in conflict with the decision of
the New York Courts in the case at
bar.**

The entire argument in plaintiff in error's brief proceeds upon the erroneous assumption that by

the law of *New York* the bankrupt had under this will an absolute and assignable interest in the principal of this trust fund. He admits (p. 5) that the New York Supreme Court both at Special Term and in the Appellate Division held the *exact opposite*, and the Opinions printed at pages 14-16 and 18-24 of the Record so show. But he ignores this situation in his argument, and claims that the Court of Appeals' *abstention* from renewed discussion of that proposition amounted to an *overruling* of the lower courts' decision thereon and an *affirmative* decision to the contrary, and he asserts that such affirmative decision thus made to appear is in conformity with the settled law of New York (Brief, Points One to Four).

But that the law of New York is not as thus asserted we shall show in the next point of this brief. And that the law of New York as applied to this particular case is the opposite of plaintiff in error's contention is shown, as above stated, by the opinions of the Special Term and Appellate Division and the authorities cited therein. The Court of Appeals *affirmed* the judgment rendered by those Courts. The *additional* arguments advanced by it in support of that judgment did not overrule either the lower courts' judgment or the grounds of their decision. Hence, the law of New York as established in this very case is contrary to the claim advanced by plaintiff in error.

Moreover, plaintiff in error entirely misconceives the scope of the Court of Appeals' opinion, and we cannot better demonstrate this than by here quoting fully from that opinion (Rec., pp. 43-44):

"I shall assume that the testator bequeathed to his son a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition, upon which the trust was limited, was fulfilled, and I shall assume, also, that that interest was assignable under the authority of *National Park Bank v. Billings* (203 N. Y. 556). It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors. It is to be observed that this is not a case in which a testator has undertaken to make a gift, and to keep it from his donee's creditors. It might in some aspects be termed a gift to encourage the donee to pay his debts, because, only by making such payment, or by showing the ability to pay, could the donee have the gift. The condition was that the donee 'shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund'. The testator had a right to impose that condition. He had a right to keep his property away from his son's creditors by not giving it to the son at all, unless the latter was able to pay his debts from other resources, and in the plainest language the testator manifested an intention to do precisely that thing. Now the trustee in bankruptcy merely represents the creditors. If, upon his appointment, he acquired the contingent interest of the bankrupt, he could sell it, applying the proceeds to the payment of the bankrupt's debts. Then, upon the bankrupt's discharge, assuming that to be a payment of his debts within the intention of the testator, which may be doubted, the assignee would be entitled to demand the principal of the trust fund from the trustee. Thus, by a process of indirection the fund, which the testator gave to his son only on condition that he should become able to pay his debts, would

be used for the very purpose of satisfying that condition, and of frustrating the testator's intention. The gift would vest upon the defeat of the testator's purpose, not upon the fulfillment of the condition imposed by him. It does not seem necessary, therefore, to indulge in definitions or in nice distinctions. The nature of the condition itself determines the controversy. The creditors or their representative, the trustee in bankruptcy, were prevented from acquiring the contingent interest of the bankrupt, because to permit this would prevent the gift from ever taking effect as contemplated by the testator upon the fulfillment of a valid condition imposed by him.

"The plaintiff seeks to reach the fund on the theory that the trustee has wrongfully paid it over to the bankrupt. In that view the plaintiff's rights are certainly no greater than as though the trustee still held it. The condition then has not been satisfied, because certainly the donee's discharge in bankruptcy was not a payment of his debts within the contemplation of the testator if his creditors prior to the discharge are at liberty to take the fund.

"The judgment should be affirmed, with costs."

Here is no decision, either express or implied, bearing on the *transferrability* or *exemption* of the bankrupt's rights under this will to any such extent as calls for action by this Court safeguarding the rights of creditors and trustees in bankruptcy under section 70a5 of the Bankruptcy Act. The case of *Eaton v. Boston Safe Deposit & Trust Company*, 240 U. S. 427, which plaintiff in error vainly attempts to distinguish on pages 69-73 of his brief, is directly in point. There, as here, the State Court (in that instance the Supreme

Judicial Court of Massachusetts) had decided against the claim of title of a Trustee in Bankruptcy to the interest of the bankrupt in a trust fund under a will which gave the income of such trust fund to the bankrupt for her life, "said income to be free from the interference or control of her creditors." The Trustee in Bankruptcy, plaintiff in error in this Court, asserted, precisely as plaintiff in error here is asserting, that the bankrupt's interest in the trust had been expressly held by the Massachusetts Supreme Court "to be assignable, and that therefore it passed under Section 70a5 of the Bankruptcy Act vesting in the Trustee all property that the bankrupt 'could by any means have transferred' ". This Court, however, unanimously overruled that contention and affirmed the decree saying in part, after mentioning certain Massachusetts decisions upholding such restrictive clauses as those contained in the will (italics ours) :

"The conclusion that the fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an annuity to an assignee as it fell due, when the assignor to whom it was bequeathed free from creditors had not attempted to avoid his act. *Ames v. Clarke*, 106 Mass. 573. The other case does not go beyond a dictum that carries the principle no farther. *Huntress v. Allen*, 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949. It is true that where the restriction has been enforced there generally has been a clause against anticipation, but the present decision in following them *holds the restricting clause paramount, and therefore we feel warranted in*

assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will. Whether, if that power were absolute, the restriction still should be upheld, as in case of a statutory exemption that leaves the bankrupt free to convey his rights, it is unnecessary to decide.

* * *

"The policy of the bankruptcy act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

The gravamen of the New York Court of Appeals' opinion in the case at bar, like that of the Massachusetts Court in the *Eaton* case, above cited, was "the dominant intent of the will". The testator was disposing of his own property and

"The doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

Nichols v. Eaton, 91 U. S. 716;
Shelton v. King, 229 U. S. 90.

These cases squarely hold that testamentary provisions designed to cease on the insolvency or bankruptcy of the beneficiaries, or provisions vesting in trustees discretionary powers which they may or may not exercise in favor of beneficiaries, or other testamentary provisions dictated by an

intent (to quote from the *Nichols* case above cited) of "a parent or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune and even his own improvidence or incapacity for self-protection," create no rights in trustees in bankruptcy and are valid and violative of no public policy. The analogy between the principle of such provisions and of state statutes *exempting* certain property from execution or other Court process is pointed out in the *Nichols* case, and in the *Shelton* case this Court said:

"There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid."

The provision in the will now before the Court no more offends public policy than would a provision terminating the interest of a beneficiary upon his bankruptcy or insolvency, and the elaborate argument contained in Point Seven and elsewhere in our adversary's brief based on the supposed invalidity of this provision falls to the ground.

As pointed out in the State Court opinions, the special condition attached by the testator to the disposition of his property in the fourth clause of his will *precludes*, in the nature of things, the conception of any interest ever having vested in plaintiff in error. The very office of plaintiff in error sprang into existence *because* the bankrupt had *not* attained the condition without

reaching which he never could acquire any interest in the fund. Plaintiff in error represents, of course, only creditors whose claims existed and were provable when the bankruptcy proceeding was initiated. With over \$23,000 of such debts and no resources of any kind, the bankrupt had not *at that time* satisfied the condition precedent, that he should have "become financially solvent and able to pay all his just debts and liabilities from *resources other than the principal of this trust fund.*" But that was the time which *forever* fixed the relations of plaintiff in error to the bankrupt and his property. If the bankrupt had no property-right at that time in the principal of this fund which passed to plaintiff in error nothing that thereafter vested a property-right in him could vest such property-right in plaintiff in error. Plaintiff in error's theory is that the condition in the will was satisfied by the *discharge of the bankrupt from all his debts*, on the principle that that discharge was equivalent to the bankrupt's "becoming" solvent and "able to pay all his just debts and liabilities from resources other than the principal of this trust fund". But he then turns around and, although representing only *exactly the same debts* thus necessarily treated as already paid *from other resources*, seeks to obtain this fund to pay out upon those very debts. The contradiction between the two branches of this proposition would seem too obvious to need comment. Either the debts in question were to be deemed paid out of other resources or they were not. If they were, then those same debts could not afterwards be made the basis of administration of a fund acquired only on the assumption that they had been *paid* out of other funds. Thus

the argument proceeds in a vicious circle, and to crown with success the highly technical proposition thus advanced would in effect nullify this will and violate the expressed intention of this testator.

Plaintiff in error refers at various points in his brief (pp. 4, 25-27, 79-82) to the *Matter of Farmers Loan and Trust Company*, 65 Misc. 418, the Kings County Surrogate's Court proceeding mentioned *ante*, page 6, in which, long after the discharge of both bankrupt and his trustee (and long before the latter's re-appointment), the accounts of this defendant in error as Executor under the will of Charles Palmer were judicially settled and allowed. Because in that proceeding (to which, of course, the plaintiff in error was not a party) the Surrogate's Court held the discharge in bankruptcy equivalent to a performance of the condition of the will, and therefore directed the Trust Company to pay over the fund to Francis J. Palmer, which it accordingly did, plaintiff in error asserts (Brief, pp. 25-27, 74-99) that the discharge in fact performed the condition, that defendants in error are *estopped* to deny this, and that, notwithstanding the inconsistency of said position already pointed out, the Trust Company should have disobeyed the Surrogate's decree and paid over the fund, not to the discharged bankrupt, but to his trustee in bankruptcy, although the latter had also been discharged and was not reappointed until later.

But, in the first place, such an effect of the Surrogate's decision would not be compatible with that decision itself, for it is clear from the Surrogate's opinion that he regarded the discharge in bankruptcy as a complete *payment* of all the

bankrupt's just debts out of resources *other* than this fund. Hence, any application of this fund to the payment of those debts would violate the Surrogate's theory as well as the testator's intention. The Court of Appeals in the case at bar well said (Rec., pp. 43-44):

"The plaintiff seeks to reach the fund on the theory that the trustee has wrongfully paid it over to the bankrupt. In that view the plaintiff's rights are certainly no greater than as though the trustee still held it. The condition then has not been satisfied, because certainly the donee's discharge in bankruptcy was not a payment of his debts within the contemplation of the testator if his creditors prior to the discharge are at liberty to take the fund."

Aside from this, however, while it is an essential element of plaintiff in error's case that the Surrogate's supposed theory be accepted (for there was certainly no *other* performance of the condition), the defendants in error are not called upon to take any position with regard thereto. The decision of the point was not necessary to nor involved in the decision below. The Court of Appeals (Rec., p. 43) *doubted* the correctness of the Surrogate's conclusion but did not pass upon it. The Appellate Division (Rec., pp. 23-24) said:

"We do not consider that the decree of the Surrogate's Court, referred to in the complaint, affects in any way the issues involved in the present action. It certainly is not *res adjudicata* of any question because the proceeding was not between the same parties or their privies. In any aspect it can only be considered as advisory to the Trust Company, as trustee."

There is no element of estoppel in the case. If the Surrogate's supposed theory was right, plaintiff in error's position is not improved, because the discharge must then be treated as having wiped out all claims represented by him so far as this fund is concerned, and also because he must still show that under the provisions of this will there existed in Francis J. Palmer, *before* the performance of the condition precedent, a property-right which vested in plaintiff in error upon his original appointment. If, on the other hand, the Surrogate's theory was wrong, that again would not improve the status of plaintiff in error, because, in order to obtain the payment of the fund over to him by Francis J. Palmer, and *a fortiori* a second payment of it by the Trust Company, he would himself be bound to maintain the Surrogate's contention. Obviously plaintiff in error could not acquire any interest in this fund through an *unauthorized* payment of it to the bankrupt. For, under such a payment, the fund in the hands of the bankrupt would be merely property acquired subsequently to the filing of the bankruptcy petition, to which, of course, the trustee in bankruptcy would have no title whatever.

POINT IV.

By the law of New York Francis J. Palmer took under the Will no interest in the Principal of the Trust Fund which he could have assigned.

We have already referred the Court to the opinions of the Special Term and Appellate Division

in this case (Rec., pp. 14-16, 18-24) as establishing the above proposition, and have shown that those opinions remain uncriticized by the Court of Appeals, and stand as *the law of this case* on the subject. They rest upon the following among other decisions of the New York Court of Appeals:

Kenyon v. See, 94 N. Y. 563;
Booth v. Baptist Church, 126 N. Y. 215;
Hasbrouck v. Follett, 171 N. Y. 674.

As these cases are very fully discussed and explained in the opinions in the case at bar (Rec., pp. 14-16, 18-24), we shall not extend this brief by repeating the discussion here. Notwithstanding the wilderness of authorities referred to in our opponent's brief, no attempt is there made to distinguish the first two of the cases above cited. What plaintiff in error has to say about the *Hasbrouck* case on pages 93-94 of his brief is no answer to the discussion of that authority by the Appellate Division in the case at bar (Rec., pp. 22-23).

We would also refer the Court to *Young v. Young*, 127 App. Div., 130, where the Court construed a provision in a will in many respects similar to the one at bar as a condition precedent intended to put the trust fund covered thereby beyond the reach of the creditors of the testator's son and which had to be complied with before the trust would terminate.

The Federal Courts have on various occasions declared that such "a bare possibility" as this will gives to the bankrupt does not constitute any estate or assignable interest. Thus, in

Re Wetmore, 108 Fed. Rep. 520, the Circuit Court of Appeals for the Third Circuit, in a case involving the statutes of New York State relating to future and expectant estates, pointed out that “*a bare possibility or mere expectation of acquiring property* does not constitute property or a title to property; nor can it be transferred or levied upon.”

“While the right of enjoyment may be uncertain and contingent,” said the Court, “it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. * * * If the bankrupt had an expectant estate it undoubtedly passed to the trustee. But if he had no claim or title, absolute or defeasible, vested or contingent, but merely an expectation of an estate or interest in the future, then there was nothing in him to pass to the trustee.”

See also *In re Hoadley*, 101 Fed. Rep. 233; *In re Ehle*, 109 Fed. Rep. 625; *In re Hogan*, 194 Fed. Rep. 846; and *Nichols v. Eaton*, 91 U. S. 716.

Plaintiff in error, through many pages of his brief, labors to prove that under the New York statutes as interpreted by the Courts of New York the bankrupt here took, not “*a bare possibility or mere expectation of acquiring property*” in the principal of the trust fund, but a present actual property-right capable of being transferred and levied upon and sold under judicial process against him. To sustain this contention plaintiff in error relies chiefly on *National Park Bank v. Billings*, 144 App. Div. 536, which upon certain certified questions went to the Court of Appeals and was there affirmed on the opinion

of Mr. Justice Miller (203 N. Y. 556), *Oppenheimer v. Billings*, 145 App. Div. 914, *Clowe v. Seavey*, 208 N. Y. 496 and *Tuck v. Knapp*, 42 Misc. 140. A full discussion of the chief of these cases is contained in the opinions below, where they are clearly distinguished from the case at bar, and we again refer the Court to those opinions. But as *National Park Bank v. Billings* is the case mentioned in the Court of Appeals' opinion we here append a further discussion thereof.

In that case the action was by a judgment creditor of one Henry B. Billings brought under section 1871 of the New York Code of Civil Procedure for the purpose of procuring a sale of said Billings' interest in the estate of his father. That interest was in a trust fund which the executors and trustees under his father's will were instructed to hold for the benefit of the testator's widow for and during her natural life.

"And if" proceeded the provision involved in the controversy, "my son and daughter, my only two children, shall both be living at the time of my wife's death, or if one or both of them should then be dead leaving issue living at the time of my wife's death, then it is my will and I direct that my trustees and executors or the survivor of them do and shall at once upon the death of my wife divide the principal of my estate * * * into two equal portions or shares and shall set apart one share, one half part, for my son or his issue, and one share the other half part, for my daughter or her issue."

The will added certain provisions about the testator's son reaching the age of twenty-five years and then made provision for gifts over in the event of such son's failing to reach such age or to survive the widow.

The Appellate Division (by a divided vote, and see *Oppenheimer v. Billings*, 145 App. Div., 914) held that the above will created a property interest in the said son which he could *assign* and which *therefore* could be reached by his creditors; that the will did contain a "gift" to the son "not in express words, but in a *direction* to trustees to divide and pay"; that the son "acquired upon the death of his father, not a bare possibility merely, but the *right* to the possession and enjoyment of one-half of his father's estate in the event that he should attain the age of twenty-five years and survive his mother," and that "that right was not subject to the will of a *third party*."

But, applying these tests to the case at bar, it becomes apparent that under none of them could the two cases be decided alike (and this conclusion is fortified by the fact that it was the very *same* Appellate Division which decided both cases, and decided them differently). There is in the will now before the Court no "gift" to the testator's son, either in express words or by any *direction* to the trustee to pay. On the contrary, the testator avoids anything of that kind with the greatest possible care. The only express gift which he makes is made to the trustee, and the only *direction* to the trustee to pay over is that whereby the testator directs that the fund be paid over to persons *other than the testator's son* upon the death of the latter. The sole expression of the testator's desire that his son may ever receive the principal of the fund is carefully cast in the form of a mere "*wish*", dependent upon the occurrence of certain conditions precedent; and the carrying out of that wish upon those conditions precedent is in turn vested by the testator

absolutely in the discretion of the trustee selected by him and upon whose sole judgment he relies. This trustee he does not *direct* but merely *authorizes* and *empowers* to carry out his wish when in its judgment the proper time to do so shall have arrived, if that time ever does arrive. It is to the trustee's judgment—a judgment, moreover, expressly declared by the testator to be subject to no revision whatever—that the owner of the fund confides the right to determine when, if ever, the gift of the principal to persons *other* than his son shall be taken away from them and the principal be handed over to his son. How then can it be said here, as it was in the *Billings* case, that the son acquired on his father's death a "right" to anything, or that that "right was not subject to the will of a third party"? And what is there here which the son could have alienated or assigned? The provision in his favor in this case was a mere *personal* benefit to be earned in the trustee's judgment by certain behavior on his part and which benefit he alone could reap. The testator gave no power or authority to the trustee to pay this principal to any *assignee* of his son, and no such assignee could under any contingency have compelled the trustee to pay over the money to him. Hence, under all the tests of the *Billings* case the plaintiff's contention fails.

The other cases cited on plaintiff in error's brief afford no better precedent than the *Billings* case for giving to the will now before the Court the construction urged by him.

Thus, *Oppenheimer v. Billings*, 145 App. Div. 914, involved the same will as that examined in *National Park Bank v. Billings*, where, as above pointed out, there was no condition precedent such as exists in the case at bar.

The facts and the wills before the Court in *Clowe v. Seavey*, 208 N. Y. 496, *Higgins v. Downs*, 101 App. Div. 119, *Tuck v. Knapp*, 42 Misc. 140, *St. John v. Dann*, 66 Conn. 401, and the other cases cited by plaintiff in error, are so entirely unlike those in the case at bar that we need not prolong this discussion by particular analyses of those decisions. They are distinguished from the case at bar for the same reasons as those set forth in connection with the *Billings* case. The case of *Cushman v. Cushman*, 116 App. Div. 763, affirmed without opinion by the Court of Appeals (191 N. Y. 505), is strong authority for the proposition that the judgment of a *third person*—the trustee—was here interposed (as it was in that case) between the performance of the condition precedent by the donee and the springing into existence of any property-right whatever in the latter.

By testator's will there was granted to the testamentary trustee what is known under the law of New York as a special power in trust, and no estate or title in or to the fund which was the subject of this power passed to the bankrupt, or could pass to him until after the power was exercised, and this power could only be exercised upon the fulfillment of the conditions which justified its exercise. The following sections of the real property law of New York apply also to personal property.

Section 118 of the Real Property Law of the State of New York, in force at testator's death, being Chapter 46 of the General Laws, provided as follows:

"Sec. 138. Special Power in Trust:—A special power is in trust where either,

"1. The disposition or charge which it authorizes is limited to be made to a person

or class of persons, other than the grantee of the power; or

"2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

Section 172 of said Real Property Law provided as follows:

"See. 172. Intent of Grantor to be observed.—Except as provided in this article, the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the supreme court to supply a defective execution as provided in this article."

In the case of *Allen v. De Witt*, 3 N. Y., 276, the Court said:

"The question presented by this cause is, whether the power given to the executors to sell the real estate of the testator, was well executed by the conveyance to Hubbell.

"The general rule is, 'that to the due execution of a power, there must be a substantial compliance with every condition required to precede or accompany its exercise.' (*Chance on Powers*, 172, sec. 454; 1 R. S. 737, sec. 121.) The condition in this will is, that *after* the debts of the testator shall have been paid, the *avails* of his property should be equally divided between his children. By *avails* I understand cash, or securities, the representatives of money. The debts of the testator were not paid at the time of the conveyance to Hubbell.

"The argument in support of the sale is, that it was in effect a division of the *avails*, and a setting apart this parcel of land, considered as cash, to the use of Hubbell in right of his wife in part satisfaction of her claim

as one of the children of the testator, to an undivided fourth part of the proceeds of her father's estate.

"There are two objections to this view of the case. 1st. The execution differs from the power in this, that the sale to Hubbard was *before*, while the testator declares that the division of the "avails" shall be *after* the debts were paid. In *Dike v. Rich* (Cro. Car. 335), the power was to sell all the tenements, or so much as with the goods were *sufficient* to pay debts, &c. It was held not only that there *must be a deficiency*, but that a sale could only be made to the *extent* of it. Here the debts must be *paid* before the residue of the "avails" can be divided."

The Appellate Division in the case at bar held:

"In the first place there is no express gift to him (the bankrupt) either in future or in *praesenti*, nor is there to be found a distinct direction to the trustee to pay the principal over to him at any time or upon any condition (Rec., p. 20).
* * * * *

"That Francis J. Palmer should satisfy the Trust Company that he was 'solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund,' and that the Trust Company should thereupon decide 'in its own judgment' that the fund should be paid to him were clearly conditions precedent to be performed before he acquired any right or title to the trust fund (*Kenyon v. See*, 94 N. Y., 563; *Booth v. Baptist Church*, 126 N. Y., 241). That condition had not been complied with when he became adjudicated a bankrupt and was never complied with until his debts had been extinguished by his discharge. He had therefore no title to the fund at the time of his adjudication which he could have

assigned or which passed to his trustee, and consequently the latter never acquired any such title." (Rec., p. 23.)

The judgment of the Appellate Division was affirmed by the Court of Appeals without modification and is, as we have already pointed out, conclusive in this case.

The Court of Appeals of the State of New York, in the case of *The Farmers' Loan and Trust Company, as Trustee, etc. vs. Mortimer*, 219 N. Y., 290, made the following quotation which seems to be appropriate to the case at bar:

"It is not, I apprehend, to be doubted," says ROLT, L. J., in *Cooper v. Martin* (L. R. [3 Ch.] 47, 58), "that equity * * * will not uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention."

What was said by the Court of Appeals in the case of *Hennessy v. Patterson* (85 N. Y., 91), at page 96, in reference to the contention which was there made by the appellant in that case is equally applicable to the claim that is made by the bankruptcy trustee in the present case. In the former case the Court was construing a will which evidently intended to bar strangers from participating in the property which the testator had accumulated by his care and labor. In the case at bar the testator is equally desirous of preventing the creditors of his son from sharing in his property. The Court of Appeals in the former case said (page 96):

"The will was evidently intended to bar the possible interest of a successor, or son-in-

law, and keep from the hands of strangers, not of the testator's blood, the property gained by his care and labor. Whatever else may be true of the case, this purpose and intention is distinct and plain, and must have its proper weight in determining the construction of the will. The claim of the plaintiff, if sustained, overrides that intention, and renders nugatory and useless the precautions of the testator."

POINT V.

The writ should be dismissed and the judgment below affirmed with costs.

Respectfully submitted,

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